UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 21-RC-136849

CARGILL, INC.,

Employer,

and

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL No. 324

Petitioner.

EMPLOYER'S REQUEST FOR REVIEW TO THE NATIONAL LABOR RELATIONS BOARD OF THE REGIONAL DIRECTOR'S DECISION TO DISMISS EMPLOYER'S OBJECTION #1

Prepared by:

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

Douglas M. Topolski
Daniel A. Adlong
Counsel for Cargill, Inc.

1909 K Street, N.W., Suite 1000
Washington, DC 20006
(202) 263-0242 (phone)
(202) 887-0866 (fax)

695 Town Center Drive, Suite 1500 Costa
Mesa, CA 92626
(714) 800-7902 (phone)
(714) 754-1298 (fax)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CARGILL, INC.,	)	
Employer,	)	
And	)	Case No. 21-RC-136849
UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL NO. 324	)	
Petitioner.	)	

EMPLOYER'S REQUEST FOR REVIEW TO THE NATIONAL LABOR RELATIONS BOARD OF THE REGIONAL DIRECTOR'S DECISION TO DISMISS EMPLOYER'S OBJECTION #1

Pursuant to Sections 102.69(c)(4) and 102.67 of the Rules and Regulations of the National Labor Relations Board (the "Board"), Cargill, Inc. ("Cargill" or the "Employer"), files this Request for Review to the National Labor Relations Board of the Regional Director's Decision to Dismiss Employer's Objection #1 (hereinafter "Request for Review") in the Supplemental Decision and Order Directing Hearing and Notice of Hearing issued on February 25, 2015, by the Regional Director for Region 21 (hereinafter "Supplemental Decision").[1] Ex.1. This Request for Review should be granted based upon the following grounds:

- Substantial questions of law and policy are raised because of the absence of officially reported National Labor Relations Board ("the Board") precedent related to arguments set forth herein concerning the interpretation and enforcement of the Board's Rules and Regulations and decisions as they apply to the requirements for challenging

[1] In the Supplemental Decision, the Regional Director dismissed Employer's Objection #1 while Objections #2 through #5 remain pending and were the subject of a hearing held on March 5, 2105. *See* Ex. 1.

Regional Directors' decisions and orders in representation matters after a hearing has been closed and the penalties for failing to follow required procedures.

- The Regional Director's decision to dismiss the Employer's Objection #1 is clearly erroneous and prejudicially affects the rights of the Employer.
- Rulings made in connection with this proceeding have resulted in prejudicial error.
- There are compelling reasons for reconsideration of an important Board policy to establish proper procedures for dismissing petitions with prejudice.

I. BACKGROUND AND BASIC OVERVIEW

Petitioner United Food and Commercial Workers Union Local No. 324 (the "Petitioner" or the "Union") filed a Petition in Case No. 21-RC-133636 on or about July 28, 2014 (the "first petition"). Petitioner in that case sought an election in an inappropriate unit of a portion of the production and maintenance employees employed by Cargill at its Fullerton, California facility ("the Facility"). Ex. 2. Specifically, the Petitioner sought a unit of only packaging, shipping, and receiving employees, excluding all leads in these categories as statutory supervisors. *See* Ex. 3 at 1–2. After a hearing on August 12, 2014, the first petition was properly dismissed. Succinctly stated, the Union failed to prove that certain lead operators and employees were statutory supervisors and refused to proceed in any unit that included them. *See* Ex. 3 at 13–14.

The Union did not file a request to review the Decision and Order ("D&O") as required by the Board's Rules and Regulations. Instead, the Union filed the petition in this matter seeking the same unit that was the subject of the dismissed first petition. Ex. 4. The Employer moved to dismiss the instant petition on the grounds that Board law requires a six month prejudice period before refiling a petition for the same or similar unit that was the subject of a petition dismissed

after a hearing concluded. *See* Exs. 5–7. The Regional Director denied the Employer's Motion. Ex. 8.

Another unit hearing was held on October 2, 2014 in this matter. The Petitioner continued to claim, upon nothing more than exactly the same evidence rejected in the first hearing, that the same lead operators and employees were statutory supervisors notwithstanding the Regional Director's unreviewed and final conclusion after the first hearing to the contrary. *See* Ex. 9, October 2, 2014 Tr. at 5–7 and 13; *see also* Ex. 10, Petitioner's Post Hearing Brief at 14–18.

The parties filed post hearing briefs addressing the Petitioner's request for an election in the inappropriate segment of the integrated production and maintenance unit at the Facility. Exs. 10 and 11. The Employer also filed a Motion to Strike Petitioner's Post-Hearing Brief or, in the Alternative, to Strike the Petition in its Entirety on October 13, 2014, on the grounds that on October 2, 2014, the Union confirmed that it continued to seek the same unit that was the subject of the dismissed petition. Ex. 12.[2]

On October 29, 2014 the Regional Director nevertheless issued a Decision and Direction of Election ("D&DE") in an inappropriate portion of the Facility's production and maintenance unit. Ex. 14. The Employer filed a Request for Review of the Regional Director's D&DE on November 12, 2014. Ex. 15. The Board denied this request in a brief Order dated December 3, 2014. Ex. 16. The Board's Order did not address the substance of the Employer's arguments. *Id.*

An election was held at the Employer's facility on December 4, 2014. The tally resulted in 14 ballots cast for the Petitioner and 14 ballots cast against the Petitioner, with three

[2] On October 1, 2014, the Employer also filed a request for special permission to appeal the ruling failing to grant the motion to dismiss. Ex.13.

challenged ballots. Following the election, the Employer filed Objections to Conduct Affecting the Results of the Election ("Objections") including Objection #1 challenging the propriety of the election as the petition should have been dismissed with prejudice as a result of the dismissal of Case No. 21-RC-133636. Ex. 17. In Objection #1, the Employer correctly asserts:

> The election conducted in this matter is invalid because the petition should have been dismissed with prejudice as a result of the dismissal of Case No. 21-RC-133636. The National Labor Relations Board completely failed to address the Employer's sound arguments seeking dismissal in the Employer's Request for Review, thereby improperly failing to follow NLRB practices and regulations and denying the Employer and affected employees due process.

Ex. 1. The Regional Director rejected this claim and overruled Objection #1. *See* Ex. 1. This Request for Review follows.

II. ISSUES

- Whether the Regional Director improperly dismissed the Employer's Objection #1 to the election, refused to set aside the results of the election held on December 4, 2014, and failed to dismiss the petition with prejudice as required.

III. THE EMPLOYER'S OBJECTION #1 TO THE ELECTION, CHALLENGING THE APPROPRIATENESS OF THE PETITION IN THIS MATTER, SHOULD HAVE BEEN SUSTAINED

A. Relevant Facts and Procedural History

The Petitioner filed its first petition addressing the Facility on July 28, 2014, in Case No. 21-RC-133636. Ex. 2. After changing its position several times, and after being given a recess at the hearing to consider the issue specifically, the Petitioner stated on the record that it would proceed only in a unit of all full-time and regular part-time packaging, shipping, and receiving employees without lead personnel. Ex. 18, 21-RC-133636 August 12, 2014 Hearing Transcript ("August 12, 2014 Hearing Tr.") at 271–72. The Petitioner contended that lead operators and

employees should be excluded because they were supervisors within the meaning of Section 2(11) of the National Labor Relations Act ("the Act"). *E.g.*, Ex. 18 at 11. The Employer sought to include all lead operators and employees as well as terminal, quality control, and maintenance employees. *Id.* at 15.

A hearing to resolve these issues took place on August 12, 2014. Near the end of this hearing, which lasted almost a full day, the Petitioner was asked specifically if it wanted to change its position as to whether lead employees were statutory supervisors. It was granted a recess specifically to consider this question. Ex. 18 at 271–72. After being given all the time it wanted to define its position, and after being given every opportunity to present all the evidence it wanted to introduce, the Petitioner clearly stated its conclusion. When asked after the recess if it wanted to change its position that it would proceed to an election only in a unit of packaging, shipping, and receiving employees without lead operators and employees (*see* Ex. 18, August 12, 2014 Hearing Tr. at 270), the Petitioner said simply "No." Ex. 18 at 272.

Upon the record established at the hearing, the Regional Director correctly concluded in the D&O that the Petitioner failed to meet its burden of showing that the lead operators and employees were 2(11) supervisors. Ex. 3 at 13–14. Thus, the Regional Director correctly concluded that the unit sought by the Petitioner was not appropriate. *Id.* at 13. Since the Petitioner expressly disclaimed interest in proceeding in any unit other than the one it demanded that excluded the lead operators and employees, the Regional Director properly dismissed the first petition. *Id.* at 13–14.

The Petitioner did not file a request for review of the D&O. Instead, it responded by filing a second petition in the instant matter on September 16, 2014. Ex. 4. The Petitioner again sought a unit of only all full time and regular part time employees in the packaging, shipping, and

receiving departments. The Petitioner refused to concede that lead operators in these departments must be part of any appropriate unit as previously determined by the Regional Director in Case No. 21-RC-133636. *E.g.* Ex. 9 at 17 and Ex. 10 at 14–18. Thus, the petition in this matter sought exactly the same unit already found inappropriate in Case No. 21-RC-133636. Ex. 4. Notwithstanding, and over the Employer's objections and numerous challenges, the Regional Director issued the D&DE, ordering an election in the inappropriate unit. Ex. 14. On December 3, 2014, the Board upheld the Regional Director's determination and refused to cancel the election. Ex. 15. Again, the Board was silent as to the substance of the Employer's position that the petition in this matter should be dismissed.

As noted above, the improper election was held on December 4, 2014. After the election, the Employer appropriately maintained its challenge to the petition, the inappropriate unit, and the election by filing timely Objections. Included in these Objections was Objection #1, again challenging the propriety of the petition seeking an identical unit to the one found inappropriate in Case No. 21-RC-133636.

On February 25, 2015 the Regional Director issued a Supplemental Decision, ordering a hearing on 4 of the Employer's 5 objections, but dismissing Objection #1. Ex. 1. This Request for Review follows.

For the reasons discussed below, Objection #1 should be sustained, the results of the election held on December 4, 2014 should be set aside, and the petition should be dismissed.

B. The Employer's Objection #1 in This Matter Should be Sustained and the Election Results Should be Set Aside

The Petition in the instant matter sought the same unit found inappropriate in Case No. 21-RC-133636. Ex. 9, Tr. at 10–13. Indeed, the Petitioner essentially conceded this point. "We have consistently taken the position in the previous case [21-RC-133636] then in this case that

they [lead employees] are statutory supervisors. We have not changed that position." Ex. 9, Tr. at 13; *see also* Ex. 15 at 7-8 and record citations cited therein. Later at the October 10, 2014 hearing, the Petitioner contended it might have "screwed up" when it made the decision at the first hearing to proceed only in a unit that excluded lead employees. Ex 9, Tr. at 20. Board law does not permit this kind of vexatious, piecemeal second guessing.

First, the Board's Rules and Regulations make clear that the unit determinations made by the Regional Director after consideration of a hearing record are "final." 29 CFR § 102.67(b). The only way to challenge these determinations is to file a request for review with the Board. *Id.* Even then, the grounds for review are very narrow. 29 CFR § 102.67(c). They do not include permitting a petitioner to change a position taken at the hearing solely because the party does not like the outcome that its positions at the hearing produced. They certainly do not permit allowing a petitioner to ignore completely the procedures requiring a request for review by filing a new petition seeking to re-litigate the same issues in the same unit at the same facility while the period to request review as to the first petition is still pending solely because the Petitioner "changed its mind" about or might have "screwed up" as to positions taken at the first hearing after seeing the results they produced. Here, of course, the Petitioner never filed a request to review the D&O issued in Case No. 21-RC-133636. Thus, the D&O and the decisions made therein are beyond consideration in any other proceedings for at least six months.

The Rules and Regulations clearly define the procedures required, not suggested, to challenge the decisions and orders of Regional Directors made after a hearing in a representation case has concluded. The Board should make clear that these procedures are the only available options to challenge the decisions and orders of Regional Directors made upon the completed record in a representation proceeding. Allowing Regional Directors to ignore these Rules and

Regulations for the sole purpose of allowing a petitioner to "change its mind" to receive a "do over" because the petitioner did not like the outcome of the first hearing should be deemed a misuse of the powers delegated to Regional Directors by Section 3(c) of the Act and a denial of due process to the other parties to the representation proceeding.

Second, any effort by the Petitioner to change the position it took as to the unit it defined in Case No. 21-RC-133636 after the close of the August 12, 2014 hearing would, by definition, require a re-opening and then reconsideration of the record. The Rules and Regulations do not permit the Petitioner to do this in the circumstances created by the two petitions it has filed. A request to re-open the record after the close of the hearing, or a motion for reconsideration or for a rehearing for that matter, requires "extraordinary circumstances." 29 CFR § 102.65(e)(1). Specifically excluded from such grounds is raising any issue that could have been raised but was not raised under any other section of the Board's Rules. *Id.* Indeed, a request to re-open the record or for a rehearing requires specification of the error alleged, the prejudice to the movant caused by this error, what new evidence is to be produced, why it was not available at the hearing, and how it would change the result. *Id.* A motion for reconsideration requires the identification of a material error with particularity and page number of the record. Of course, these requests must be made in the proceeding where the record was created, i.e. Case No. 21-RC-133636. *Id.*

The Petitioner has never made any effort to define any "extraordinary circumstances" requiring reopening or reconsidering the record in Case No. 21-RC-133636 because none exist. To the contrary, the Petitioner's only stated purposes for filing the second petition seeking to relitigate the issue of whether lead employees are statutory supervisors was that it "changed its mind" and ". . . the Union or its counsel may have screwed up at the last hearing" by stating that

it would not proceed in any unit including lead employees. Ex. 10 at 15; Ex. 9 at 20. If the Petitioner wanted to "change its mind" about which units it found acceptable, it should have done so when given a recess to do exactly that at the hearing held in Case No. 21-RC-133636. The Petitioner cannot avoid the consequences of its actions and decisions or the procedures required to challenge these consequences merely by waiting to see how its first position fares, ignoring the adverse ruling it produces, and then filing a new matter seeking to re-litigate the issue it lost solely because it "may have screwed up" by making a choice that led to a result it did not like.

Third, the Board has been consistent in its view that parties should not be allowed to litigate issues in an untimely or piecemeal fashion. *E.g.* 29 CFR § 102.65(e)(1)(no motion for reconsideration, rehearing, or to re-open the record shall be considered by the Regional Director with respect to any matter that could have but was not raised pursuant any section of the Board's Rules); and *cf. Jefferson Chemical Co., Inc.,* 234 NLRB 992 (1972)(Board will not condone piecemeal litigation of ULP claims); *Peyton Packing Co., Inc.,* 129 NLRB 1358 (1961)(same). The Union's petition in this matter violates both of these principles and these violations were perpetuated when the Region permitted an election to be held.

To the extent there is any question about the Board's view on piecemeal litigation (as suggested by the Regional Director – *see* Ex. 8 at unnumbered p. 2) or that this sound principle is applicable to representation proceedings, the Board should clarify that point now. Parties in representation proceedings should be required to state all their positions at the appropriate hearing and accept the results those positions produce without the option of getting another hearing solely to "change its mind" because it made a mistake if it does not like what its positions produced the first time around. Indeed, the Board's new election regulations emphasize this point.

The Petitioner had every opportunity to change its position as to what units it would accept before and during the hearing in Case No. 21-RC-133636. The Regional Director issued her decision based upon the evidence in the record and the Petitioner's stated position as to whether and to what extent it would proceed to an election based upon determinations made on that record. The Petitioner had procedures available to it to challenge the Regional Director's determinations based upon the record and the positions asserted by the first petition at the time the record was created. The Petitioner chose not to use those required procedures. Whether the instant petition is considered an effort to re-litigate the same issues already decided in Case No. 21-RC-133636, or a piecemeal effort to offer a new position in a new proceeding as to the same unit at the same facility that was addressed in Case No. 21-RC-133636 that could have and should have been made in the first case, it is clear that the Union's petition in this case is improper. As such, Objection #1 should be sustained, the results of the December 4, 2014 election should be set aside, and the petition should be dismissed.

Finally, the Casehandling Manual makes clear that the instant petition should have been dismissed regardless of how the Petitioner attempts to define it. Since the Petitioner sought the same unit it sought in Case No. 21-RC-133636 and this unit has already been found inappropriate, the petition should have been dismissed for this reason alone and the election results should be set aside. *See* Casehandling Manual Part Two Representation Proceedings (CHM) § 11011. To the extent the Petitioner purported to change its position in this case and seek a different portion of the unit at issue in Case No. 21-RC-133636, it could not do so without first accepting the dismissal of the petition in Case No. 21-RC-133636, requesting review of the decision in that case, or seeking withdrawal of the petition. Accepting dismissal, or any

withdrawal to the extent such an option is even available at this stage, must come with prejudice and with a six-month bar to filing a new petition. *E.g.* CHM § 11112.1(a).

The Casehandling Manual is clear that petitions withdrawn after a hearing has been closed cannot be refiled for a period of six months. It makes no sense to suggest that this same prejudice period should not apply when the petitioner's petition is dismissed after a hearing has closed because a petitioner states it will not proceed in any unit other than the one it defined and litigated at a hearing, and the Regional Director concludes this unit is not appropriate. To conclude otherwise would condone, if not encourage, exactly what has happened in this matter. A party can take one position at a hearing and see what result it produces. If it does not like the outcome, it can bypass the requirements of the Board's Rules and Regulations defining how decisions must be reviewed by filing a new action seeking the same unit under a different theory that it could have or should have raised in the first proceeding. This vexatious conduct produces exactly the kind of wasteful misuse of resources that the Board has condemned in other contexts. *See Jefferson Chemical*, 200 NLRB at 992 n.3.

In light of the above, it is clear that the very integrity of the Board's processes is at issue in this proceeding. To the extent there is any ambiguity in the application of the Board's Rules and Regulations and the Casehandling Manual, they should be made clear now. The Board should not permit petitioners to avoid the consequences of positions taken at hearings merely by ignoring the decisions of Regional Directors and filing new petitions seeking to re-litigate the same issues that have already been decided using positions or arguments that were available but intentionally not used in the first proceeding. Moreover, it is important for the Board to clarify that the wasteful and vexatious misuse of the Board's procedures pursued by the Petitioner in this case will not be tolerated. The Board should make it clear that the procedures in its well-

established Rules and Regulations must be followed and that there are consequences for calculated and intentional decisions to do otherwise.

Thus, the Board should immediately order that Employer's Objection #1 to the election be sustained. The results of the election held on December 4, 2014 should be set aside. Further, the petition should be dismissed with prejudice such that the Petitioner is precluded from seeking an election in any unit including packaging, shipping and or receiving employees at the Facility for a period of six months from the date of the Board's Order.

IV. CONCLUSION

For the reasons set forth above, the Board should sustain the Employer's Objection #1 to the election, set aside the results of the election held on December 4, 2014, dismiss the petition, and otherwise bar the Petitioner from refiling another petition in any unit including packaging, shipping and or receiving employees at the Facility for a period of six months from the date of the Board's Order.

Respectfully submitted,

/s/

Douglas M. Topolski
Daniel A. Adlong, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1909 K Street, N.W., Suite 1000
Washington, DC 20006
(202) 263-0242
Attorneys for Respondent, Cargill, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 11, 2015 this Employer's Request for Review to the National Labor Relations Board of the Regional Director's Decision to Dismiss Employer's Objection #1 was filed electronically and that service copies were sent via e-mail (given the volume, exhibits will follow by FedEx) to:

Robert A. Cantore, Esq.
Gilbert & Sackman
3699 Wilshire Blvd Suite 1200
Los Angeles, CA 90010
rac@gslaw.org

Olivia Garcia, Regional Director
National Labor Relations Board, Region 21
888 S. Figueroa Street, 9th Floor
Los Angeles, California 90017
olivia.garcia@nlrb.gov

/s/
Douglas Topolski

20580063.1

Exhibit 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

CARGILL, INC.

Employer

and Case 21-RC-136849

UNITED FOOD & COMMERCIAL WORKERS
UNION LOCAL NO. 324

Petitioner

SUPPLEMENTAL DECISION AND ORDER DIRECTING HEARING AND NOTICE OF HEARING

This Decision[1] contains my determinations regarding the three determinative challenged ballots and the Employer's objections to conduct affecting the results of the election conducted on December 4, 2014,[2] among the employees of the Employer, in the unit found appropriate for the purposes of collective bargaining ("unit").[3] The Employer's objections allege: (1) the dismissal of the petition in Case 21-RC-133636, should have been with prejudice, which would have precluded the processing of the petition in the above-captioned matter; (2) the Petitioner threatened unit employees in order to cause them to drop their opposition to the Petitioner; (3) Petitioner supporters engaged in electioneering in the polling area while the polls

---

[1] This report has been prepared under Section 102.69 of the Board's Rules and Regulations, Series 8, as amended.
[2] Unless otherwise specified, all dates herein are 2014.
[3] The collective-bargaining unit found appropriate in this matter is composed of:
INCLUDED: All full-time and regular part-time packaging, shipping, and receiving employees employed by the Employer at its facility located at 566 North Gilbert Street, Fullerton, California;
EXCLUDED: All other employees, maintenance employees, terminal employees, quality-control employees, staffing-agency employees, office clerical employees, guards and supervisors as defined in the Act.

were open; (4) the Petitioner instructed its election observer to solicit and encourage electioneering in the polling area just before the polls opened; and (5) while waiting in line to vote, pro-Petitioner unit employees engaged in a loud demonstration just outside the polling room and Board agents made no effort to investigate or end the conduct.

As described below, I have determined that that Employer's Objection No. 1 is without merit, and should be overruled. I have further concluded that the substantial and material factual and legal issues raised by the three determinative challenged ballots and Employer's Objection Nos. 2, 3, 4 and 5 can best be resolved by a hearing, and herein Order and give Notice of such hearing.

Procedural History

The petition in this matter was filed on September 16. Pursuant to a Decision and Direction of Election issued on October 29, an election by secret ballot was conducted on December 4, among the employees in the above-noted unit. The tally of ballots served on the parties at the conclusion of the election showed that of approximately 33 eligible voters, 14 cast ballots for, and 14 against, the Petitioner. There was one void ballot and three challenged ballots, which are sufficient in number to affect the results of the election. The Employer timely filed objections to the election, a copy of which was served upon the Petitioner. A copy of the Employer's objections is attached hereto as Attachment A.

The Challenged Ballots

During the election, the ballots of Josh Ennulat, Leonardo Garcia, and Donna Teuscher were challenged on the grounds that they are office clerical employees, which are excluded from the collective-bargaining unit. Ennulat and Garcia were challenged by the Employer's observer and Teuscher was challenged by the Petitioner's observer. All three names

were listed on the *Excelsior* list proffered by the Employer. The Employer contends that based on the Petitioner's intention to challenge Teuscher, the Employer re-evaluated its view of the unit and decided to challenge Ennulat and Garcia.

Josh Ennulat

According to the Employer, Ennulat works in the shipping office and provides administrative support for orders delivered to customer California Oils Corporation ("Caloils"). Ennulat's primary responsibility is to create and coordinate shipments in the computer system for Caloils. Ennulat ensures that finished goods are delivered to an off-site storage facility and to the appropriate carrier. Ennulat maintains frequent contact with Caloils and the off-site storage facility. These duties occupy over 90 percent of his work time. The Employer concludes that Ennulat is an office clerical and, as such, is not included in the unit.

The Petitioner contends that Ennulat is a "shipping reliever" who performs work in the shipping office, which is in the packaging building, where all other unit employees also work. Ennulat uses a computer to monitor inventory and shipping of products for Caloils. On about 3 out of 5 work days, Ennulat uses a forklift to load trucks along side of other unit employees. Ennulat also frequently performs substitute and overflow loading duties. The Petitioner asserts that Ennulat is a shipping employee who shares a sufficient community of interest with unit employees to warrant his inclusion in the unit.

Leonardo Garcia

With regard to Garcia, the Employer contends that he is the inventory control clerk and, until recently, shared the same office with Ennulat and Teuscher. Garcia also spent some time in the administrative offices, and later worked in the production office, where no unit employees work. Garcia's duties are centered on making sure that the plant's inventory is

properly reflected in the Employer's SAP computer systems. Garcia runs checks on the computer system to ensure that all the data in the system is complete and up to date, and makes adjustments to inventory in the computer system if verified discrepancies are brought to his attention. Ninety percent or more of Garcia's work is related to the SAP computer system. The Employer contends that Garcia has limited contact with unit employees. The Employer concludes that Ennulat is an office clerical employee and, as such, is not included in the unit.

The Petitioner contends that Garcia holds the title of "production controller and shipping" and, until recently, worked in the shipping office. Garcia works directly with unit shift leads Jaime Sedano and Rafael Rodriguez. Garcia receives production orders from Sedano, checks for discrepancies between actual inventory and related computer records, and fixes computer records when necessary. Garcia also works closely with packaging side forklift operators and receiving department employees to perform these duties. According to the Petitioner, Garcia estimates that 60 percent of his time is spent in the office and 40 percent of his time is spent on the shop floor. Garcia often operates a forklift to load finished goods and also substitutes for unit shipping lead Ray Ramirez when he is absent. The Petitioner argues that Garcia is a shipping employee who shares a sufficient community of interest with unit employees to warrant his inclusion in the unit.

Donna Teuscher

Regarding Teuscher, the Petitioner posits that she works in the shipping office as a traffic coordinator, and rarely works outside of the shipping office. The Petitioner contends that she has no duties in packaging, the warehouse, or other areas where bargaining unit employees work. Teuscher spends her workday scheduling trucks to pick up finished goods,

scheduling trucks for the terminal side of the plant,[4] and interacting with customers. According to the Petitioner, other than with customers and non-unit truck drivers, most of Teuscher's interactions are with Employer supervisors and managers, but not with other employees. The Petitioner concludes that Teuscher is an office clerical employee and, as such, is not included in the unit.

For its part, the Employer contends that Teuscher is the Employer's transportation coordinator. Teuscher works in the shipping office, which she shares with Ennulat, Ramirez, and a temporary employee. Teuscher is responsible for ensuring that the correct type and amount of finished product gets on the right trucks. Teuscher contacts shipping companies to coordinate when trucks come to the facility, and uses the SAP computer system to prepare and print a packing lists. Through the computer system, Teuscher sends the packing lists to the shipping clerk,[5] who allocates the materials and then informs unit shipping employees of what to load. Teuscher also monitors order fulfillments against truck schedules based on appointment times and the shipper that is assigned to load the truck. The shipper and or the shipping clerk will let Teuscher know of problems with trucks, short shipments, materials that cannot be located, and other issues. Conversely, if Teuscher detects any problems, she will contact the shippers to determine possible causes and solutions. Teuscher regularly fills in for and assists Ramirez and Ennulat. She also performs SAP computer health checks as Garcia does. The Employer contends that Teuscher's regular duties place her in constant daily contact with other unit employees including shipping loaders Tim Albert, Oscar Ramos, and Albert Ramirez, and production leads Jaime Sedano and Rafael Rodriguez. Thus, the Employer concludes that

---

[4] The terminal side of the plant is excluded from the unit.

[5] The shipping clerk currently is a temporary employee.

Teuscher is a plant clerical employee and an integral part of the shipping process, and as such shares a sufficient community of interest with unit employees to warrant her inclusion in the unit.

Upon consideration of the evidence presented and adduced by the investigation, I conclude that the challenges to the ballots cast by Josh Ennulat, Leonardo Garcia and Donna Teuscher raise substantial and material issues of fact that can best be resolved by a hearing.

The Objections and Analysis

Objection No. 1

> The election conducted in this matter is invalid because the petition should have been dismissed with prejudice as the result of the dismissal of Case No. 21-RC-133636. The National Labor Relations Board completely failed to address the Employer's sound arguments seeking dismissal in the Employer's Request for Review, thereby improperly failing to follow NLRB practices and regulations and denying the Employer and affected employees due process.

In Case 21-RC-133636, the Petitioner sought to represent a unit of all full-time and regular part-time packaging, shipping, and receiving employees employed by the Employer at its facility located at 566 North Gilbert Street, Fullerton, California. At the hearing conducted in that matter on August 12, the Employer asserted that the petitioned-for unit was not appropriate because it did not include the maintenance, terminal, and quality-control employees. Additionally, the Employer contended that the packaging and shipping leads and a quality-control employee are not supervisors and, therefore, should be included in the unit. The Petitioner took contrary positions and these issues were litigated. During the hearing, the Petitioner stated that it did not wish to proceed to an election in any alternate unit if the unit sought by the Petitioner was deemed to be inappropriate. In the Decision and Order issued on September 11, the Regional Director found that the packaging and shipping leads were not

supervisors as defined in the Act, and should be included in any appropriate unit. Thus, the Regional Director found that the petitioned-for unit was not an appropriate unit because it excluded the packaging and shipping leads and, therefore, the petition was dismissed.[6] No party requested reconsideration or made any request for review of the Decision and Order.

Thereafter, on September 16, the Petitioner filed the instant petition seeking to represent packaging, shipping and receiving employees employed by the Employer.

On September 23, the hearing which had been initially scheduled in this matter, was reset to commence on October 2.

On September 24, the Employer filed a Motion to Dismiss the Petition with Prejudice, and on September 26, the Employer filed a Reply to Union's Opposition to Motion to Dismiss the Petition. In its motion and its reply, the Employer contended that the unit sought in this matter is identical to the unit sought by the Petitioner in Case 21-RC-133636, and that dismissal of the instant petition was warranted because it was determined in Case 21-RC-133636 that the unit sought by the Petitioner was inappropriate. The Employer further asserted that the Board's Rules and Regulations prohibited the Petitioner from filing a new petition concerning the same unit of the Employer's employees while the period for filing a request for review of the Decision and Order in Case 21-RC-133636 was still pending, and prohibited the Petitioner from filing a new petition to re-hear or re-open the record in Case 21-RC-133636, or to seek reconsideration of the Decision and Order in that case. The Employer also asserted that the instant petition was an effort to litigate issues in an untimely or piecemeal fashion.

---

[6] Therein, the Regional Director noted that under these circumstances, it was not necessary to rule on the other issues litigated at hearing.

Later on September 26, the Regional Director issued an Order Denying Employer's Motion to Dismiss Petition with Prejudice, which discussed in detail the various reasons why the Employer's Motion was without merit. For the reasons set forth therein, the Regional Director concluded that neither the prior petition, nor the Decision and Order, foreclosed the Petitioner from filing and pursuing the instant petition, and the petitioned-for unit therein.

On October 1, the Employer filed a Request for Special Permission to Appeal Ruling of the Regional Director Denying Employer's Motion to Dismiss the Petition with Prejudice. By letter dated October 2, the Executive Secretary informed the Employer that its request for special permission to appeal was procedurally improper and would not be considered by the Board, but could instead be considered in connection with a request for review of any subsequent decision issued by the Regional Director.

At hearing on October 2, the Petitioner amended its petition to indicate that it was seeking to represent the unit described above at footnote 3. During the hearing, the Employer and Petitioner took the same positions as in the prior hearing in Case 21-RC-133636, regarding the unit placement of maintenance, terminal and quality-control employees, the supervisory status of packaging leads and a shipping lead, and how both issues apply to the one quality-control employee. At hearing, the parties stipulated that the Regional Director should take administrative notice of the record developed in the hearing in Case 21-RC-133636 to decide the issues raised at the hearing in Case 21-RC-136849. No additional witnesses or evidence were presented at hearing on October 2. During the hearing, the Employer again argued that the petition in Case 21-RC-133636 should have been dismissed with prejudice to refiling, the unit sought by the Petitioner was not appropriate, issues should not be relitigated, and, therefore, the

petition should be dismissed. Prior to the hearing's close, the Petitioner confirmed that it wished to proceed to an election in an alternate unit if the unit sought by the Petitioner was deemed to be inappropriate.

On October 9, both parties submitted post-hearing briefs. In its brief, the Employer argued: (1) the petition should be dismissed with prejudice, (2) if the petition is not dismissed, the Employer's October 1 request for a special appeal from the order denying its motion to dismiss should be granted, and alternatively (3) an election should be directed in the unit proposed by the Employer. Additionally, on October 13, the Employer filed a Motion to strike the Petitioner's post-hearing brief, or portions of it regarding the supervisory status of lead employees. Therein, the Employer again argued for the dismissal of the instant petition.

As referenced above, on October 29, the Regional Director issued a Decision and Direction of Election in the instant matter.

On November 12, the Employer filed its request for review of the Decision and Direction of Election, and again argued that the petition should be dismissed with prejudice or, alternatively, an election should be directed in the unit proposed by the Employer.

By Order dated December 3, the Board denied the Employer's Request for Review of the Decision and Direction of Election as it raised no substantial issues warranting review.

In support of Objection No. 1, the Employer references the arguments that it advanced in its September 24 and 26, October 9, and November 12 submissions.

The Petitioner contends that Employer's Objection No. 1 provides no basis to set aside the election.

The Board's Casehandling Manual Part Two Representation Proceedings provides for the *withdrawal* of petitions with 6 months prejudice (Secs. 11112, 11113, and 11118). The Manual provides for dismissal without prejudice of RM and RD petitions, when a union has disclaimed interest in representing the involved employees (Sec. 11124). The Manual makes no provision for the *dismissal* of petitions with prejudice, which has been sought by the Employer.

As detailed above, since the filing of this petition, the Employer has repeatedly advanced various procedural and due process arguments in support of its position that the instant petition should be dismissed. Such arguments were considered and subsequently rejected in the Order issued on September 26, the Decision issued on October 29, and the Board's Order dated December 3. The Employer's motions to dismiss have been fully litigated and the Employer raises nothing new that either was not or could not have been previously litigated in this matter. Finally, inasmuch as the Board has previously denied the Employer's Request for Review, the Employer is not now entitled to relitigate this issue as an objection. See *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146, 162 (1941); Board's Rules, Secs. 102.67(f) and 102.69(c); *Middletown Hospital Association*, 282 NLRB 541 (1986), and *NTA Graphics, Inc.*, 303 NLRB 801 (1991).

Accordingly, I determine that that Employer's Objection No. 1 is without merit, and should be overruled in its entirety.

Objection No. 2

> The Union, by its employees and agents, threatened voting unit employees with harassment and other consequences if they did not cease exercising their Section 7 right to oppose union representation. This illegal conduct took place between the date the petition was filed and the date election was held.

The Employer contends that a unit employee, herein referred to as Witness A, will testify in support of Employer's Objection No. 2.

According to the Employer, Witness A will testify that at a meeting conducted by the Employer, the witness told employees that the Union did not help strikers when the witness was involved in a strike at a former employer. A few days later, during the critical period, Union Organizing Director Gilbert Davila visited Witness A at his home, as he had done once before. Davila told Witness A that he heard about what the witness said at the meeting, accused the witness of not telling the truth, and ended their argument with words to the effect that, "I know where you stand and I will not be back to your house unless I hear another story like this and then I will have to come talk to you."

Regarding Employer's Objection No. 2, the Petitioner denies having engaged in any objectionable conduct.

Inasmuch as there are substantial and material factual and legal issues with regard to Employer's Objection No. 2, I shall order a hearing for this objection.

Objection No. 3

Union supporters engaged in electioneering in the polling area while the polls were open.

Objection No. 4

Union employees instructed the Union observer to solicit and encourage electioneering in the polling area just before the polls opened on December 4, 2014.

Objection No. 5

Union supporters engaged in a loud demonstration just outside the polling room while waiting in line to vote and while the polls were

> open and no effort was made by Board agents conducting the election to investigate or end this disruptive and illegal conduct.

Inasmuch as they are related, I will consider Employer's Objection Nos. 3, 4, and 5 together. The Employer contends that two unit employees and another person, herein referred to as Witness B, Witness C, and Witness D, will testify in support of these objections.

According to the Employer, Witness B will testify that while serving as the Employer's election observer, unidentified pro-Petitioner employees walked within several feet of the observer's table after they left the voting booth and gave the "thumbs up" gesture to the Union observer, in the presence of voters, observers, and the Board agents conducting the election. Nothing was said to these employees about electioneering. Witness B will further testify that that while serving as the Employer's election observer, the witness heard a lot of loud noise coming from a line of voters waiting to vote just outside the door to the polling area, which was about 30 to 40 feet from the observer table. When Witness B brought this to the attention of the Board agents, they allegedly told Witness B to disregard it.

The Employer contends that Witness C will testify that while the witness was in the polling area, the witness was booed by unidentified pro-Petitioner employees who were waiting in line to vote.

In support of Objection No. 4, the Employer contends that Witness D will testify that inside the polling area, as the preelection conference was ending, Director Davila called to the Petitioner observer by name, and gave the observer a "thumbs up" sign, which was obscured behind a folder Davila was carrying. The Employer contends that this constitutes evidence that the Petitioner had worked out a system of campaigning in the polling area while the polls were open.

For its part, the Union denies that the conduct alleged in Employer's Objection Nos. 3, 4 and 5 constitutes objectionable conduct.

Inasmuch as there are substantial and material factual and legal issues with regard to Employer's Objection Nos. 3, 4, and 5, I shall order a hearing for this objection.

Conclusions

In view of the conflicting positions of the parties and the substantial and material factual and legal issues raised by the challenges to the ballots cast by Josh Ennulat, Leonardo Garcia, and Donna Teuscher, and Employer's Objection Nos. 2, 3, 4, and 5, I conclude that such challenges and objections can best be resolved by a hearing. Accordingly, pursuant to Section 102.69(d) of the Board's Rules and Regulations, Series 8, as amended, I shall direct a hearing on the above-mentioned challenged ballots and on Employer's Objection Nos. 2, 3, 4, and 5.

As noted above, I have determined that Employer's Objection No. 1 is without merit, and should be overruled in its entirety.

Right to File Exceptions: Under the provisions of Secs. 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the Board in Washington, D.C. The request for review must be received by the Board in Washington, D.C. by March 11, 2015. Under the provisions of Sec. 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Supplemental Decision, is not part of the record before the Board unless appended to the request for review or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not

included in the Supplemental Decision shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on **March 11, 2015** at 5:00 p.m. Eastern Time, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.[7] A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

ORDER

IT IS HEREBY ORDERED that a hearing be held before a duly designated hearing officer for the purpose of receiving evidence to resolve the issues raised by the

[7] A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

challenges to the ballots cast by Josh Ennulat, Leonardo Garcia, and Donna Teuscher, and by Employer's Objection Nos. 2, 3, 4, and 5.

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of conducting such hearing shall prepare and cause to be served upon the parties a report containing the resolution of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the challenges to the ballots cast by Josh Ennulat, Leonardo Garcia, and Donna Teuscher, and the disposition of Employer's Objection Nos. 2, 3, 4, and 5. The provisions of Section 102.69 of the above Rules shall govern with respect to the filing of exceptions or an answering brief on the exceptions to the hearing officer's report.[8]

NOTICE OF HEARING

PLEASE TAKE NOTICE that, on March 5, 2015, **and such consecutive days thereafter until concluded**, at 9:00 a.m., PST, in Hearing Room 903, Ninth Floor, 888 South Figueroa Street, Los Angeles, California, a hearing will be conducted for the purposes set forth in the above Order, at which time and place the parties will have the opportunity to appear in person, or otherwise, and give testimony.

Dated at Los Angeles, California on February 25, 2015.

Olivia Garcia
Regional Director
Region 21
National Labor Relations Board

[8] This direction of hearing is subject to special permission to appeal in accordance with Section 102.69(i)(1) and Section 102.64 of the Board's Rules and Regulations, Series 8, as amended.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CARGILL, INC.,	)	
Employer,	)	
and	)	Case No. 21-RC-136849
UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL NO. 324	)	
Petitioner.	)	

EMPLOYER'S OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION

On December 4, 2014, an election was held in the above-referenced matter. On that day, the ballots were counted. The tally included 14 yes votes for the Petitioner United Food and Commercial Workers Union Local No. 324 (hereinafter "Petitioner" or the "Union"), 14 no votes cast for Cargill, Inc. ("Cargill" or "Employer"), 3 challenged ballots and 1 void ballot. Pursuant to Section 102.69 of the National Labor Relations Board's ("the Board") Rules and Regulations, the Employer files these Objections to conduct affecting the results of the election.

OBJECTION NO. 1: The election conducted in this matter is invalid because the petition should have been dismissed with prejudice as the result of the dismissal of Case No. 21-RC-133636. The National Labor Relations Board completely failed to address the Employer's sound arguments seeking dismissal in the Employer's Request for Review, thereby improperly failing to follow NLRB practices and regulations and denying the Employer and affected employees due process.

OBJECTION NO. 2: The Union, by its employees and agents, threatened voting unit employees with harassment and other consequences if they did not cease exercising their Section 7 right to oppose union representation. This illegal conduct took place between the date the petition was filed and the date election was held.

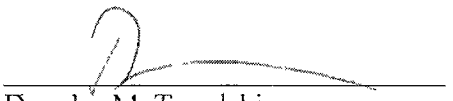
OBJECTION NO. 3: Union supporters engaged in electioneering in the polling area while the polls were open.

OBJECTION NO. 4: Union employees instructed the Union observer to solicit and encourage electioneering in the polling area just before the polls opened on December 4, 2014.

OBJECTION NO. 5: Union supporters engaged in a loud demonstration just outside the polling room while waiting in line to vote and while the polls were open and no effort was made by Board agents conducting the election to investigate or end this disruptive and illegal conduct.

HEARING REQUESTED: The Employer requests a hearing on the genuine issues of material facts raised by these Objections, which will be supported by competent evidence that will be timely submitted to the Regional Director in accordance with the Board's Rules and Regulations. Based on the evidence presented, the Employer requests that the results of the December 4, 2014 election be set aside and that the petition be dismissed with prejudice.

Respectfully submitted,



Douglas M. Topolski
Daniel A. Adlong, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1909 K Street, N.W., Suite 1000
Washington, DC 20006
(202) 263-0242Attorneys for Respondent, Cargill, Inc.

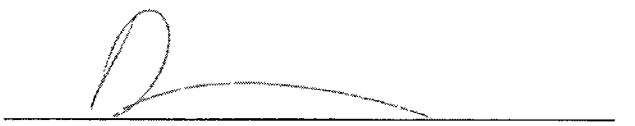
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of December 2014, the foregoing **Employer's Objections to Conduct Affecting the Election** was filed electronically and that service copies were sent via e-mail to:

Robert A. Cantore, Esq.
Gilbert & Sackman
3699 Wilshire Blvd Suite 1200
Los Angeles, CA 90010
rac@gslaw.org

Olivia Garcia, Regional Director
National Labor Relations Board, Region 21
888 S. Figueroa Street, 9th Floor
Los Angeles, California 90017
olivia.garcia@nlrb.gov

Sylvia Meza, Board Agent
National Labor Relations Board, Region 21
888 S. Figueroa Street, 9th Floor
Los Angeles, California 90017
sylvia.meza@nlrb.gov



Douglas Topolski

19725361.1

Exhibit 2

INTERNET FORM NLRB-502 (2-08)

FORM EXEMPT UNDER 44 U.S.C.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
PETITION

DO NOT WRITE IN THIS SPACE	
Case No. 21-RC-133636	Date Filed 7-28-14

INSTRUCTIONS: Submit an original of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

The Petitioner alleges that the following circumstances exist and requests that the NLRB proceed under its proper authority pursuant to Section 9 of the NLRA.

1. PURPOSE OF THIS PETITION (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One)

- [x] **RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- [ ] **RM-REPRESENTATION (EMPLOYER PETITION)** - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- [ ] **RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE) - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.**
- [ ] **UD-WITHDRAWAL OF UNION SHOP AUTHORITY (REMOVAL OF OBLIGATION TO PAY DUES)** - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- [ ] **UC-UNIT CLARIFICATION**- A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees: (Check one) [ ] In unit not previously certified. [ ] In unit previously certified in Case No. _____
- [ ] **AC-AMENDMENT OF CERTIFICATION**- Petitioner seeks amendment of certification issued in Case No. _____ Attach statement describing the specific amendment sought.

2. Name of Employer	Employer Representative to contact	Tel. No.
Cargill	Jesus J. Valadez	714-449-6735

3. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)	Fax No.
566 & 560 N. Gilbert Street Fullerton, CA 92833	71449-6780

4a. Type of Establishment (Factory, mine, wholesaler, etc.)	4b. Identify principal product or service	Cell No.
Factory	Cooking Oil	e-Mail

5. Unit Involved (In UC petition, describe present bargaining unit and attach description of proposed clarification.)	6a. Number of Employees in Unit:
Included All Full time & Part time regular production employees	Present 36
Excluded Managers, supervisors, leadmen, office clerical, temporary employees(temps) and gurards as defined in the act.	Proposed (By UC/AC)
(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)	6b. Is this petition supported by 30% or more of the employees in the unit?* [x] Yes [ ] No *Not applicable in RM, UC, and AC

7a. [ ] Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about (Date) _____ (If no reply received, so state).

7b. [ ] Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Name of Recognized or Certified Bargaining Agent (If none, so state.)	Affiliation	
None		
Address	Tel. No. / Cell No.	Date of Recognition or Certification
	Fax No.	e-Mail

9. Expiration Date of Current Contract, If any (Month, Day, Year)	10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop (Month, Day and Year)
11a. Is there now a strike or picketing at the Employer's establishment(s) Involved? Yes [ ] No [x]	11b. If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of (Insert Name) _____, a labor organization, of (Insert Address) _____ Since (Month, Day, Year) _____

12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above. (If none, so state)

Name	Address	Tel. No.	Fax No.
None		Cell No.	e-Mail

13. Full name of party filing petition (If labor organization, give full name, including local name and number)
United Food & Commericial Workers Union Local 324

14a. Address (street and number, city, state, and ZIP code)	14b. Tel. No. EXT	14c. Fax No.
8530 Stanton Ave. Buena Park, Ca 90622	714-996-4601	714-229-1159
	14d. Cell No.	14e. e-Mail

15. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (to be filled in when petition is filed by a labor organization)
United Food & Commericial Workers International Union. AFL-CIO

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print)	Signature	Title (if any)
~~Gilbert Davila~~ Jose Perez		~~Director of Organizing~~ Organizer
Address (Street and number, city, state, and ZIP code) 8530 Stanton Ave. Buena Park, CA 90622	Tel. No. 714-995-4601 / Cell No. 714-920-3417	Fax No. 714-229-1159 / eMail gdavila@ufcw324.org

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Exhibit 3

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

CARGILL, INC.[1] Employer and **UNITED FOOD & COMMERCIAL WORKERS UNION LOCAL NO. 324**[2] Petitioner	Case 21-RC-133636

DECISION AND ORDER

United Food & Commercial Workers Union Local No. 324 (Petitioner) filed the instant petition on July 28, 2014, seeking to represent all full-time and regular part-time packaging, shipping, and receiving employees employed by the Employer at its facility located at 566 North Gilbert Street, Fullerton, California for collective-bargaining purposes; excluding all other employees, packaging leads, shipping leads, office clerical employees, professional employees, staffing agency employees, guards and supervisors as defined in the National Labor Relations Act.[3]

The Employer contends that the petitioned-for unit is not an appropriate unit because it does not include the maintenance, terminal, and quality-control employees, who share a

[1] The Employer's name appears as amended at the hearing.
[2] The Petitioner's name appears as amended at the hearing.
[3] The Petitioner amended the unit description at the hearing.

community of interest with the petitioned-for employees. In addition, the Employer contends that the packaging and shipping leads are not supervisors as defined in the Act, and should also be included in the unit.

On August 12, 2014, a hearing in this matter was held before a hearing officer of the National Labor Relations Board (the Board), and the parties thereafter filed briefs. Pursuant to the provisions of Section 3(b) of the National Labor Relations Act (the Act), the Board has delegated its authority in this proceeding to me.

I. THE ISSUES AND SUMMARY

The issues are:

1. Whether the packaging, shipping, and receiving employees share an overwhelming community of interest with the maintenance, terminal, and quality-control employees, so as to be included in a single unit for purposes of collective bargaining.
2. Whether the packaging leads (Jaime Sedano and Rafael Rodriguez), the shipping lead (Raymond Ramirez), and a quality-control employee (Steve Lim), are supervisors under the Act. The Petitioner contends that they are supervisors as defined by Section 2(11) of the Act. The Employer contends that they are employees as defined in the Act, and should be included in the unit.

Based on the record in its entirety, I find that the packaging and shipping leads are not supervisors as defined in the Act, and should be included in any appropriate unit. Thus, I find that the petitioned-for unit is not an appropriate unit because it excludes the packaging and shipping leads. At the hearing, the Petitioner stated that it does not wish to proceed to an

election in any alternate unit if the unit sought by the Petitioner is deemed to be inappropriate. Therefore, I hereby dismiss the petition.[4]

FACTUAL BACKGROUND

A. Overview of the Employer's Operation

The Employer is engaged in the business of operating an oil processing facility in Fullerton, California.[5] Oil arrives at the facility in bulk via railcars or trucks. It is then stored, tested in a lab at the facility, certain oils are blended, and oil ultimately get packaged and shipped to customers. A total of 51 employees (including 3 leads) work in the following departments: terminal, quality-control, maintenance, packaging, shipping, and receiving.[6]

Terminal employees unload the oil from railcars or trucks, and transfer it to the appropriate tanks. The quality-control department (also known as the lab) is in charge of testing the oil each time it gets moved within the facility and after it gets blended. This department has four lab technicians who perform the analysis to test the oil. Various employees, including terminal employees, leads, and certain packaging employees, drop off oil samples at the lab for testing. The maintenance department currently consists of four mechanics responsible for repairing equipment in the facility, including equipment used by machine operators in the packaging department.

---

[4] Since the Petitioner does not wish to proceed to an election in any alternate unit, it is not necessary to rule on the issues of: (1) whether the packaging, shipping, and receiving employees share an overwhelming community of interest with the maintenance, terminal, and quality-control employees; and (2) whether Steve Lim, a quality-control employee, is a supervisor as defined in the Act.

[5] The parties agreed to a commerce stipulation: the Employer, a Delaware corporation, with a facility located at Fullerton, California, is engaged in the business of operating an oil processing facility. During the past 12 months, a representative period, the Employer, purchased and received goods valued in excess of $50,000 which goods were shipped directly to the Employer's Fullerton, California facility from points located outside the State of California.

[6] Eight employees work in the terminal, 4 in quality-control, 4 in maintenance, 23 in packaging, 9 in shipping, and 3 in receiving.

Packaging-department employees perform various tasks. There, employees operate one of four lines: one where oil is packed into 35 lb. jugs in a cardboard boxes; one where it gets packed as a 50 lb. cube; one where oil gets packed into 5-quart bottles; and a so-called OLE line where oil get packed in different types of smaller bottles. Among the packaging employees, some work as relievers, votator operators, filler operators, or depalletizers. Relievers are responsible for filling in and relieving anyone in the lines, votator operators operate a particular machine that adjusts the viscosity of the oil, filler operators operate the machines in the line, and depalletizers remove boxes from pallets. Other packaging employees use forklifts to move the packaged oil to a warehouse area.

Thereafter, the oil gets shipped out by employees in the shipping department. Shipping employees either load trucks with finished product or perform clerical work related to shipping.

The receiving department handles the purchase and receipt of raw materials. The purchaser coordinates the purchase of raw materials while the other receiving employees operate forklifts to unload and store the material at the facility.

Stephanie Puig ("Puig") is the supervisor of the terminal, packaging, shipping, and receiving departments. In those departments, Puig is responsible for issuing any necessary discipline. She is also involved in hiring for those departments. Employees go to her to request time off, and she approves vacation requests. She is also responsible for conducting performance appraisals for those employees.

B. Packaging Leads Jaime Sedano and Rafael Rodriguez[7]

There are two leads in the packaging department; Jaime Sedano ("Sedano"), first-shift lead, and Rafael Rodriguez ("Rodriguez"), the second-shift lead. Their duties are to monitor the

[7] Neither of these two leads testified at the hearing.

schedule for the lines in packaging. The record evidence is not clear as to what "monitoring" the packaging lines entails. The packaging leads also take oil samples to the lab. In addition, they monitor orders in the computer system and perform other computer functions. They can operate the machines in the packaging area.

1. Jaime Sedano

a. Transfer / Recommendation to transfer

The Petitioner presented Carlos Hernandez ("Hernandez"), a receiving-department employee, as a witness at the hearing. According to Hernandez, Sedano transferred him from the packaging department to receiving department about three months ago. In this regard, Hernandez testified that Sedano told him to "go and help at receiving" and left him there. Hernandez admitted that he does not know whether Sedano received instructions from someone else to transfer him. Hernandez testified that Sedano simply told him to "go help" in receiving.

At the hearing, the Petitioner also presented employee Carlos Alban ("Alban"), who testified that Sedano told him that Sedano was going to recommend him for his current position as purchaser in the receiving department. The record is not clear as to when this conversation took place.[8] According to Alban, Sedano was the purchaser before Sedano was promoted to be a lead. Alban testified that Sedano trained Alban for two weeks for the purchaser job sometime before the official announcement was made that Sedano was going to become the packaging lead. Alban further testified that Sedano told him, "You know what, I will put my word, you know, for you to be the purchaser."

At the hearing, Alban also stated that he submitted an application for this job, and that he was interviewed by Plant Manager Jesus Valadez, Project Engineer Linsay Farrell, and

[8] Alban has worked as a purchaser for about 7 months. Presumably, the conversation happened around that time. Prior to becoming a purchaser, Alban worked in another area at the facility.

Sedano. On cross-examination, Alban admitted that he does not know what weight was given to Sedano's recommendation in the decision to move him to his current position.[9]

b. Assignment of overtime

Employee Israel Ramirez testified that Sedano has sometimes told him that he has to come in on Saturday to work overtime, but that most of the time the Employer asks for volunteers to work overtime. On rebuttal, Puig testified that the overtime schedule is made by Kelli Stiver, the production scheduler. If production is running behind, Stiver consults with Puig to determine whether overtime is necessary to catch up. The Employer tries to give employees advance notice of overtime. However, when enough notice cannot be provided, the Employer will solicit volunteers. According to Puig, Sedano's only role in this process is to write down the names of those who volunteer, and submit them to her for approval of payroll.

c. Assignment of work

The only evidence of Sedano's involvement in the assignment of work was adduced by certain questions asked by the hearing officer during Puig's testimony. Puig testified that packaging leads have assigned other workers to do certain specific task such as to go dump reprocessed oil.

2. Rafael Rodriguez

As noted above, Puig testified that packaging leads (Sedano and Rodriguez) may assign employees to go dump reprocessed oil. There is no other evidence in the record specifically pertaining to Rodriguez's duties as a lead.

[9] Puig, who was not working at the facility during the time that Alban was hired as the purchaser, testified that she does not know who approved his transfer.

C. Shipping Lead Raymond Ramirez[10]

The shipping department has one lead, Raymond Ramirez ("Ramirez"). All employees in that department work the first shift. There are a few hours during the shift when Puig is not onsite, and shipping lead Ramirez monitors the operation of the department. The record contains limited evidence detailing what Ramirez does to monitor the department. This evidence primarily comes from Puig's testimony. For example, on cross-examination, Puig testified that if a fight breaks out among shipping employees when she is away, the shipping lead will call her. She will then decide whether anyone should be sent home.

During examination by the hearing officer, Puig testified that Ramirez has assigned others to do inventory checks. Inventory is routinely checked once the end of each month for accounting purposes, but Ramirez can assign someone to do an inventory check at other times if needed. Puig further testified that Ramirez can also assign employees to move product from one area of the warehouse to another. According to Puig, Ramirez spends much of his time on what the Employer calls "Idoc failures," which means correcting computer-system communication failures. There is no other evidence in the record describing Ramirez's duties.

D. Other Evidence Related to the Supervisory Status of Leads.

Employee Alban testified that he was initially hired to work at the Employer's facility as lead-temporary worker through a staffing agency two years ago. Alban testified that when he was a lead, he fired a worker "on the spot." The record does not indicate precisely when this happened. The worker that he fired was a temporary employee who got into a fight with another temporary worker. No further details of this incident were provided at the hearing.

[10] Raymond Ramirez did not testify at the hearing.

Alban also testified that when he worked as a lead, he was not referred to as a "Supervisor One." He claims that he first heard this phrase from a manager named Mike Mattingly[11] about two weeks prior to the hearing in this case. According to Alban, he and Mattingly were discussing the Union when Mattingly mentioned that the leads were considered level-one supervisors. No other employee testified that leads are known as "level-one supervisors," and no employees testified that they view their leads as supervisors.

ANALYSIS

A. Section 2(11) Supervisor Legal Frame Work

The Petitioner asserts that the packaging and shipping leads are statutory supervisors as defined by Section 2(11) of the Act. The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). Section 2(11) of the Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment.

Under Board and Supreme Court precedent, in order to be a statutory supervisor, an individual must have the authority to effectuate or effectively recommend at least one of the supervisory indicia enumerated in Section 2(11) of the Act, using independent judgment in the interest of the employer. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001)).

[11] The record is not clear as to who is Mike Mattingly. He was described by Alban as the plant manager's boss.

Supervisory status must be established by a preponderance of the evidence. *Oakwood Healthcare, Inc.*, supra at 694. Lack of evidence is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). "[W]henever the evidence is in conflict or otherwise inconclusive on particular indicia or supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center,* 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. *Golden Crest Healthcare Center,* 348 NLRB 727, 731 (2006); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Further, job descriptions and job titles are only paper authority and are not given any controlling weight by the Board. *Avante at Wilson, Inc.*, id.; *Training School at Vineland,* 332 NLRB 1412, 1416 (2000).

In the instant case, the Petitioner has failed to meet its burden in establishing the supervisory status of the packaging and shipping leads. None of the packaging and shipping leads were presented at the hearing to testify with respect to their day-to-day duties. Only three employee witnesses testified regarding the duties of the leads to whom they allegedly report, but their testimony lacked detail. The record in general is devoid of detailed evidence as to the responsibilities and duties of the leads. Instead the Petitioner relied largely on general conclusionary statements made by the employee witnesses, and limited testimonial evidence adduced by the Petitioner during Puig's cross-examination.

The Petitioner claims that the leads are referred to by the Employer as level-one supervisors. But, the only evidence presented to support this claim was Alban's testimony that Manager Mike Mattingly made a comment to that effect. This evidence is insufficient to prove

this allegation. Although the Petitioner presented four employee witnesses, none of them testified that the leads are known as level-one supervisors or that they view their leads as supervisors. Moreover, as the Petitioner correctly noted in its brief, supervisory status is determined by an individual's duties, not by his job title or classification. As discussed below, the record evidence regarding the leads' duties failed to establish that the leads are supervisors.

B. Packaging Lead Jaime Sedano

The Petitioner contends that the packaging leads are supervisors because they can assign employees to perform specific duties, assign employees to specific departments, and assign overtime.

However, the only evidence presented regarding the packaging leads' involvement in the assignment of work was through Puig's testimony when she stated that packaging leads can ask employees to go "dump reprocessed oil." No specific examples or direct evidence of work assignments by the packaging leads were presented. Without other evidence, the act of simply asking employees to dump oil does not rise to the level of independent judgment necessary to establish that the leads exercise the requisite statutory authority to assign or direct. Accordingly, the record evidence is insufficient to establish these indicia.

As to the alleged assignment of employees to specific departments, employee Hernandez testified that Sedano transferred him from the packaging department to the receiving department. But, the only other detail provided about Sedano's involvement in this transfer was that Sedano told Hernandez to "go help out in receiving." Hernandez admitted that he did not know whether Sedano was following instructions from someone above him. The record evidence does not establish who made the decision to transfer Hernandez, nor does it fully describe the extent of

Sedano's role in the transfer. Accordingly, this evidence is insufficient to show that Sedano and the other leads have authority to transfer or reassign workers to different departments.

The Petitioner also claims that leads can effectively make hiring recommendations. In this regard, employee Alban testified that before it was officially announced that Sedano was going to become a lead, Sedano trained Alban for the position of purchaser, a position held by Sedano before he became a lead. Alban testified that Sedano told him, "I will put my word, you know, for you to be the purchaser." It is not clear on the record whether Sedano made this statement before or after he became a lead. Alban admitted that he submitted an application for the purchaser position, and that he was interviewed by the plant manager along with a project engineer and Sedano. However, the record lacks any details regarding the alleged interview or the extent of Sedano's participation in it. Accordingly, without context and explanation, I cannot find that Sedano effectively made a hiring recommendation. [12]

Likewise, there is insufficient evidence to conclude that leads have authority to assign overtime. The only evidence presented in support of this claim is employee Israel Ramirez's testimony that Sedano has sometimes told him that he has to come in on Saturdays, but that now the Employer seeks volunteers most of the time. The Petitioner did not present any further details regarding the assignment of overtime. On rebuttal, Puig testified that the lead's role in scheduling overtime is to solicit and write down the names of employees who volunteer for overtime. Thus, the record evidence failed to establish that leads assign overtime. Where there is

[12] Nor can I conclude that the leads have authority to discharge employees as contended by the Petitioner. Although employee Alban testified that he fired a temporary employee when he was a lead sometime around one or two years ago, Alban provided very limited details of this event. Even if Alban exercised independent authority to discharge an employee, that would be insufficient to establish that the current leads at issue in this case (Sedano, Rodriguez, and Ramirez) have the authority to discharge.

inconclusive evidence, the party asserting supervisory status has failed to meet its burden. *Dean & Deluca New York, Inc.*, 338 NLRB at 1048.

The Petitioner did not present other evidence of Sedano's supervisor authority. Therefore I find that Petitioner failed to meet its burden to prove that Sedano is a supervisor as defined in Section 2(11) of the Act.

C. Packaging Lead Rafael Rodriguez

The only record evidence regarding the duties of packaging lead Rodriguez was testimony by Puig stating that packaging employees (Sedano and Rodriguez) can assign employees to go "dump reprocessed oil." For the reasons discussed above, this evidence is insufficient to establish that the packaging leads are statutory supervisors. Therefore, I find that the Petitioner failed to meet its burden to prove that Rodriguez is a supervisor as defined in Section 2(11) of the Act.

D. Shipping Lead Raymond Ramirez

The Petitioner suggests that leads are supervisors because they monitor the operations of their department and are accountable for their performance when Puig is away from the plant. Puig admitted that she is away from the facility during a portion of the shipping department's shift, and acknowledged that the shipping lead (Ramirez) monitors the department during this time. However, no evidence was produced by the Petitioner to explain what Ramirez does to "monitor" the department.

The only other evidence that was presented regarding Ramirez's duties was Puig's testimony that Ramirez can assign employees to do inventory checks or to move product from one part of the warehouse to another. This limited evidence suggests that these assignments are merely routine and ministerial. Thus, the evidence is insufficient to show that Ramirez exercised

any supervisory authority. Therefore, I find that the Petitioner failed to meet its burden to prove that shipping lead Ramirez is a Section 2(11) supervisor as defined in the Act.

CONCLUSION

Based on the entire record in this matter and in accordance with the discussion above, I find and conclude that:

1. The hearing officers' rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner did not meet its burden of establishing that the packaging and shipping leads are supervisors as defined in Section 2(11) of the Act. Therefore, the petitioned-for unit is inappropriate because it excludes the packaging and shipping leads.

5. Since the Petitioner does not wish to proceed to an election in any alternate unit if the petitioned-for unit was deemed to be inappropriate, I hereby dismiss the Petition.

ORDER

IT IS HEREBY ORDERED that the Petition in this matter, be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by September 25, 2014. The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov,[13] but may not be filed by facsimile.

DATED at Los Angeles, California, this 11th day of September, 2014.

Olivia Garcia
Regional Director, Region 21
National Labor Relations Board

[13] To file the request for review electronically go to www.nlrb.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlrb.gov.

Exhibit 4

FORM EXEMPT UNDER 44 U.S.C.

INTERNET FORM NLRB-502 (2-08)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
PETITION

DO NOT WRITE IN THIS SPACE

Case No.	Date Filed
21-RC-136849	9-16-14

INSTRUCTIONS: Submit an original of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

The Petitioner alleges that the following circumstances exist and requests that the NLRB proceed under its proper authority pursuant to Section 9 of the NLRA.

1. PURPOSE OF THIS PETITION (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One)

- [x] **RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- [ ] **RM-REPRESENTATION (EMPLOYER PETITION)** - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- [ ] **RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE) - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.**
- [ ] **UD-WITHDRAWAL OF UNION SHOP AUTHORITY (REMOVAL OF OBLIGATION TO PAY DUES) -** Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- [ ] **UC-UNIT CLARIFICATION-** A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees: (Check one) [ ] In unit not previously certified. [ ] In unit previously certified in Case No. _____
- [ ] **AC-AMENDMENT OF CERTIFICATION-** Petitioner seeks amendment of certification issued in Case No. _____ Attach statement describing the specific amendment sought.

2. Name of Employer	Employer Representative to contact	Tel. No.
Cargill, Inc.	Jesus J. Valadez	714-449-6735

3. Address(es) of Establishment(s) involved *(Street and number, city, State, ZIP code)*	Fax No.
560 & 566 N. Gilbert Street Fullerton, CA 92833	714-449-6780

4a. Type of Establishment (Factory, mine, wholesaler, etc.)	4b. Identify principal product or service	Cell No.
Factory	Cooking Oil	e-Mail

5. Unit Involved *(In UC petition, describe* **present** *bargaining unit and attach description of proposed clarification.)*

Included All full-time and regular part-time packaging, shipping and receiving employees employed by the Employer at its facility located at 560 & 566 N. Gilbert Street Fullerton, CA 92833.

Excluded All other employees, maintenance employees, terminal employees, quality-control employees, technical employees, staffing agency employees, office clerical, guards and supervisors as defined in the National Labor Relations Act.

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

6a. Number of Employees in Unit:
Present: 33
Proposed *(By UC/AC)*:

6b. Is this petition supported by 30% or more of the employees in the unit?* [x] Yes [ ] No
*Not applicable in RM, UC, and AC

7a. [ ] Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about (Date) _____ (If no reply received, so state).

7b. [ ] Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Name of Recognized or Certified Bargaining Agent *(If none, so state.)*	Affiliation
None	

Address	Tel. No.	Date of Recognition or Certification
	Cell No.	Fax No. / e-Mail

9. Expiration Date of Current Contract, If any *(Month, Day, Year)*	10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop *(Month, Day and Year)*

11a. Is there now a strike or picketing at the Employer's establishment(s) involved? Yes [ ] No [x]	11b. If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of *(Insert Name)* _____, a labor organization, of *(Insert Address)* _____ Since *(Month, Day, Year)* _____

12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above. (If none, so state)

Name	Address	Tel. No.	Fax No.
None		Cell No.	e-Mail

13. Full name of party filing petition (If labor organization, give full name, including local name and number)
United Food and Commercial Workers Union Local 324

14a. Address *(street and number, city, state, and ZIP code)*	14b. Tel. No. EXT	14c. Fax No.
8530 Stanton Avenue Buena Park, CA 90620	714-995-4601 e269	714-229-1159
	14d. Cell No.	14e. e-Mail

15. Full name of national or international labor organization of which Petitioner is an affiliate or constituent *(to be filled in when petition is filed by a labor organization)*
United Food and Commercial Workers International Union AFL-CIO

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name *(Print)*	Signature	Title *(If any)*
Gilbert Davila	Gilbert Davila	Organizing Director

Address *(street and number, city, state, and ZIP code)*	Tel. No.	Fax No.
8530 Stanton Avenue Buena Park, CA 90620	714-9954601	714-229-1159
	Cell No. 714-920-3417	eMail

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Exhibit 5

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

CARGILL, INC.

Employer

and

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 324

Case No. 21-RC-136849

Petitioner

EMPLOYER'S MOTION TO DISMISS THE PETITION WITH PREJUDICE

Employer, Cargill, Inc. ("Employer" or "Cargill"), through undersigned counsel, respectfully requests that the Regional Director dismiss the above-captioned petition with prejudice. Accordingly, for the reasons discussed below, Employer's Motion to Dismiss the Petition with Prejudice should be granted.

INTRODUCTION AND PROCEDURAL HISTORY

The petition in this case represents the second time within weeks that United Food & Commercial Workers International Union, Local No. 324 ("the Union") has sought an election in an inappropriate unit of a portion of the production and maintenance employees employed by Cargill at its Fullerton, California facility ("the Facility"). The first petition was properly dismissed. *See* Exhibit 1, Decision and Order (D&O) in Case 21-RC-133636 (decided September 11, 2014). This most recent petition should be dismissed as well.

The Union filed its first petition addressing the Facility on July 28, 2014 in Case No. 21-RC-133636. Exhibit 1 at 1. After changing its position several times, the Union

stated at the unit determination hearing that it would proceed only in a unit of all full time and regular part time packaging, shipping, and receiving employees. *See* Exhibit 1 at 1-2; *see also* Exhibit 2, 21-RC-133636 2014 08-12 Hearing Transcript (Tr.) at 271-72[1]. The Union contended that lead operators and employees should be excluded because they were supervisors within the meaning of Section 2(11) of the National Labor Relations Act ("the Act"). *E.g* Exhibit at 1. Cargill sought to include all lead operators and employees as well as terminal, quality, and maintenance employees. *Id.* 2-3.

Upon the record produced at a hearing lasting a full day, the Regional Director concluded in the D&O that the Union had failed to meet its burden of showing that the lead operators and employees were 2(11) supervisors. Exhibit 1. Thus, the Regional Director correctly concluded that the unit sought by the Union was not appropriate. *Id.* at 13. Since the Union expressly disclaimed interest in proceeding in any unit other than the one it demanded that excluded the lead operators and employees, the Regional Director properly dismissed the petition. *Id.* at 13-14.

The Union responded by filing a second petition in Case No. 21-RC-136849 on September 16, 2014. As explained to the Employer's counsel by the Region, the Union again seeks a unit of only all full time and regular part time employees in the packaging, shipping, and receiving departments. The Union refuses to concede that lead operators in the departments it seeks must be part of any appropriate unit as determined by the Regional Director in Case No. 21-RC-133636. Thus, the petition in this mater seeks exactly the same unit already found inappropriate in Case No. 21-RC-133636.

---

[1] Only relevant portions of the transcript of the hearing in Case No. 21-RC-133636 are included within Exhibit 2.

The Employer informed the Region of its position concerning the second petition by e-mail on September 17, 2014. The Employer correctly observed that the unit sought by the Union was inappropriate by definition because the Union refused to include the lead employees the Regional Director just days before said must be included in any appropriate unit. This alone should require dismissal. Second, the Employer correctly observed that the Union had expressly disclaimed interest in any unit except the one upon which it insisted at the hearing. Therefore, the dismissal in Case No. 21-RC-133636 should be treated as one with prejudice, barring the Union from filing any petition concerning the Facility's production and maintenance employees for 6 months.

The Region informed Employer's counsel by telephone on September 19, 2014 that it was holding in abeyance the processing of the instant matter. A written notice was issued on September 19, 2014 informing the parties of this fact and postponing indefinitely the hearing scheduled for September 26 2014.

Late in the afternoon on September 22, 2014, Counsel for Employer was informed by telephone that the Region had decided to resume processing the petition in this matter. The Region inquired as to whether Employer would be available for a hearing on October 2, 2014. The Region stated that efforts to obtain a stipulation would be pursued once the time for filing a Request for Review in Case No. 21-RC-133636 expired. Counsel for the Employer replied by stating that Employer had not changed its position that the petition in this matter should be dismissed. Employer was informed by e-mail on September 23, 2014 that notwithstanding uncertainty about whether Employer's witnesses might be available, a hearing has been scheduled in this matter for October 2, 2014. This Motion follows.

ARGUMENT

As stated above, the Union was given every opportunity at the hearing held on August 12, 2014 in Case No. 21-RC-133636 to present and change its positions concerning unit determinations at the Facility. Indeed, it was given a recess near the close of the hearing for the sole purpose of reconsidering whether it would proceed in any unit other than one it defined on the record. Exhibit 2, Tr. 271-72. After being given all the time it wanted to define its position, and after being given every opportunity to present all the evidence it wanted to introduce, the Union clearly stated its conclusion. When asked after the recess if it wanted to change its position that it would proceed to an election only in a unit of packaging, shipping, and receiving employees without lead operators and employees (*see* Exhibit 2, Tr. at 270), the Union said simply "No." Exhibit 2, Tr. at 272. Given these irrefutable circumstances, the National Labor Relations Board's ("the Board") Rules and Regulations, well established legal principles, and the Casehandling Manual all require dismissal of this petition with prejudice.

First, the Board's Rules and Regulations make clear that the unit determinations made by the Regional Director after consideration of a hearing record are "final." 29 CFR § 102.67(b). The only way to challenge these determinations is to file a Request for Review with the Board. *Id.* Even then, the grounds for review are very narrow. 29 CFR § 102.67(c). They do not include permitting a petitioner to change a position taken at the hearing solely because the party does not like the outcome that its position produced. They certainly do not permit allowing a petitioner to ignore the procedures requiring a request for review altogether by filing a new petition seeking to re-litigate the same issues in the same unit at the same facility while the first petition is still pending.

Second, any effort by the Union to change the position it took at the hearing in Case No. 21-RC-122636 would by definition require a re-opening and then reconsideration of the record. The Rules and Regulations do not permit the Union to do this in the circumstances created by the two petitions it has filed. A request to re-open the record after the close of the hearing, or a motion for reconsideration or for a rehearing for that matter, requires "extraordinary circumstances." 29 CFR § 102.65 (e)(1). Specifically excluded from such grounds is raising any issue that could have been raised but was not raised under any other section of the Rules. *Id.* Indeed, a request to re-open the record or for a rehearing requires specification of the error alleged, the prejudice to the movant caused by this error, what new evidence is to be produced, why it was not available at the hearing, and how it would change the result. *Id.* A motion for reconsideration requires the identification of a material error with particularity and page number of the record. Of course, these requests must be made in the proceeding where the record was created, *i.e.* Case No. 21- RC-133636. *Id.*

The Union cannot hope to even pretend that any "extraordinary circumstances" exist in Case No. 21-RC-133636 that would justify re-opening the record, conducting a rehearing, or pursuing re-consideration of the determinations in that case. To the contrary, the record makes clear that the Union was given a recess at the hearing for the express purpose of reconsidering its position as to whether and to what extent t would proceed with an election in any unit other than the portion the integrated production and maintenance unit it sought. If it wanted to change its position on which units it finds acceptable, it should have done so when given the opportunity in Case No. 21-RC-133636. Again, the Union cannot avoid consequences of its actions and decisions or the required procedures

required to challenge these consequences merely by completely ignoring them in favor of starting a new proceeding for sole purpose of re-litigating issues that have been decided already.

Third, the Board has been consistent in its view that parties should not be allowed to litigate issues in an untimely or piecemeal fashion. *E.g.* 29 CFR § 102.65(e)(1)(no motion for reconsideration, rehearing or to re-open the record shall be considered by the Regional Director with respect to any matter that could have but was not raised pursuant any section of the Board's Rules); and *cf. Jefferson Chemical Co., Inc.*, 234 NLRB 992 (1972)(Board will not condone piecemeal litigation of ULP claims); *Peyton Packing Co., Inc.*, 129 NLRB 1358 (1961)(same). The Union's petition in this matter violates both of these principles.

The Union had every opportunity to change its position as to what units it would accept before and during the hearing in Case. No. 21-RC-133636. The Regional Director issued her decision based upon the evidence in the record and the Union's stated position as to whether and to what extent it would proceed to an election based upon determinations made on that record. Exhibit 1. The Union has procedures available to it to challenge the Regional Director's determinations based upon the record and the positions asserted by the Union. Whether the instant petition is considered an effort to re-litigate the same issues already decided in Case No. 12-RC-133636, or a piecemeal effort to offer a new position in a new proceeding as to the same unit at the same facility that was addressed in Case 21-RC-133636 that could have and should have been made in the first case, it is clear that the Union's petition in this case is improper and should be dismissed.

Finally, the Casehandling Manual makes clear that the instant petition should be dismissed regardless of how the Union attempts to define it. To the extent the Union seeks the same unit it sought in Case No. 21-RC-133636, this unit has already been found inappropriate and the petition should be dismissed for this reason alone. Casehandling Manual Part Two Representation Proceedings (CHM) § 11011. To the extent the Union purports to change its position in this case and seek a different portion of the unit at issue in Case No. 21-RC-133636, it cannot do so without first accepting the dismissal of the petition in Case No. 21-RC-133636, requesting review of the decision in that case, or seeking withdrawal of the petition. Accepting dismissal, or any withdrawal to the extent such an option is even available at this stage, must come with prejudice and with a six month bar to filing a new petition. *E.g.* CHM § 11112.1(a).

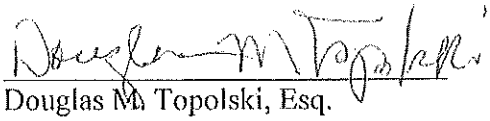
In the final analysis, nothing allows a petitioner to file a completely new petition while a petition filed by the same petitioner addressing the same issues in the same unit at the same employer facility is pending. This is particularly true when, as in this matter, the sole reasons for filing the second petition are to avoid the determinations made in the first proceeding that the petitioner does not like while providing the petitioner the chance to re-litigate issues that have already been decided, or raise issues that should have been raised or can still be raised, in the first and pending proceeding. One need only state this position to demonstrate its complete lack of merit. To let this matter proceed any further would violate the requirements of the Board's Rules and Regulations, violate well-established Board principles prohibiting raising issues in an untimely and/or piecemeal fashion, and violate the provisions of the CMH. Indeed, declining to dismiss this petition is nothing

short of a denial of due process. For these and all the reasons set out above, this petition should be dismissed immediately and with prejudice without further proceedings.

CONCLUSION

For the reasons set forth above, Employer's Motion to Dismiss the Petition with Prejudice should be granted. The petition should be dismissed with prejudice and Petitioner should not be permitted to file a petition for any election in a production and maintenance unit at Employer's Fullerton, California facility for a period of six months from the date of the Order dismissing this petition.

Respectfully submitted,



Douglas M. Topolski, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1909 K. Street, N.W., Suite 1000
Washington, DC 20006
(202) 263-0242

Ruthie L. Goodboe, Esq.
Sarah M. Rain, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
34977 Woodward Avenue, Suite 300
Birmingham, MI 48009
(248) 593-6400

Attorneys for Cargill, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of September, 2014 the foregoing Motion to Dismiss with Prejudice was filed electronically and that service copies were sent by federal express and electronic mail to:

United Food & Commercial Workers
International Union, Local 324
8530 Stanton Ave
Buena Park, CA 90620

Robert A. Cantore, Esq.
Gilbert & Sackman
3699 Wilshire Blvd Suite 1200
Los Angeles, CA 90010
rac@gslaw.org

William M. Pate, Acting Regional Director
National Labor Relations Board, Region 21
888 S. Figueroa Street, 9th Floor
Los Angeles, California 90017
William.pate@nlrb.gov

Sylvia Meza, Field Examiner
National Labor Relations Board, Region 21
888 S. Figueroa Street, 9th Floor
Los Angeles, California 90017
Sylvia.Meza@nlrb.gov

Douglas M. Topolski

Exhibit 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

CARGILL, INC.[1] Employer and **UNITED FOOD & COMMERCIAL WORKERS UNION LOCAL NO. 324**[2] Petitioner	Case 21-RC-133636

DECISION AND ORDER

United Food & Commercial Workers Union Local No. 324 (Petitioner) filed the instant petition on July 28, 2014, seeking to represent all full-time and regular part-time packaging, shipping, and receiving employees employed by the Employer at its facility located at 566 North Gilbert Street, Fullerton, California for collective-bargaining purposes; excluding all other employees, packaging leads, shipping leads, office clerical employees, professional employees, staffing agency employees, guards and supervisors as defined in the National Labor Relations Act.[3]

The Employer contends that the petitioned-for unit is not an appropriate unit because it does not include the maintenance, terminal, and quality-control employees, who share a

[1] The Employer's name appears as amended at the hearing.
[2] The Petitioner's name appears as amended at the hearing.
[3] The Petitioner amended the unit description at the hearing.

community of interest with the petitioned-for employees. In addition, the Employer contends that the packaging and shipping leads are not supervisors as defined in the Act, and should also be included in the unit.

On August 12, 2014, a hearing in this matter was held before a hearing officer of the National Labor Relations Board (the Board), and the parties thereafter filed briefs. Pursuant to the provisions of Section 3(b) of the National Labor Relations Act (the Act), the Board has delegated its authority in this proceeding to me.

I. THE ISSUES AND SUMMARY

The issues are:

1. Whether the packaging, shipping, and receiving employees share an overwhelming community of interest with the maintenance, terminal, and quality-control employees, so as to be included in a single unit for purposes of collective bargaining.
2. Whether the packaging leads (Jaime Sedano and Rafael Rodriguez), the shipping lead (Raymond Ramirez), and a quality-control employee (Steve Lim), are supervisors under the Act. The Petitioner contends that they are supervisors as defined by Section 2(11) of the Act. The Employer contends that they are employees as defined in the Act, and should be included in the unit.

Based on the record in its entirety, I find that the packaging and shipping leads are not supervisors as defined in the Act, and should be included in any appropriate unit. Thus, I find that the petitioned-for unit is not an appropriate unit because it excludes the packaging and shipping leads. At the hearing, the Petitioner stated that it does not wish to proceed to an

election in any alternate unit if the unit sought by the Petitioner is deemed to be inappropriate. Therefore, I hereby dismiss the petition.[4]

FACTUAL BACKGROUND

A. Overview of the Employer's Operation

The Employer is engaged in the business of operating an oil processing facility in Fullerton, California.[5] Oil arrives at the facility in bulk via railcars or trucks. It is then stored, tested in a lab at the facility, certain oils are blended, and oil ultimately get packaged and shipped to customers. A total of 51 employees (including 3 leads) work in the following departments: terminal, quality-control, maintenance, packaging, shipping, and receiving.[6]

Terminal employees unload the oil from railcars or trucks, and transfer it to the appropriate tanks. The quality-control department (also known as the lab) is in charge of testing the oil each time it gets moved within the facility and after it gets blended. This department has four lab technicians who perform the analysis to test the oil. Various employees, including terminal employees, leads, and certain packaging employees, drop off oil samples at the lab for testing. The maintenance department currently consists of four mechanics responsible for repairing equipment in the facility, including equipment used by machine operators in the packaging department.

---

[4] Since the Petitioner does not wish to proceed to an election in any alternate unit, it is not necessary to rule on the issues of: (1) whether the packaging, shipping, and receiving employees share an overwhelming community of interest with the maintenance, terminal, and quality-control employees; and (2) whether Steve Lim, a quality-control employee, is a supervisor as defined in the Act.

[5] The parties agreed to a commerce stipulation: the Employer, a Delaware corporation, with a facility located at Fullerton, California, is engaged in the business of operating an oil processing facility. During the past 12 months, a representative period, the Employer, purchased and received goods valued in excess of $50,000 which goods were shipped directly to the Employer's Fullerton, California facility from points located outside the State of California.

[6] Eight employees work in the terminal, 4 in quality-control, 4 in maintenance, 23 in packaging, 9 in shipping, and 3 in receiving.

Packaging-department employees perform various tasks. There, employees operate one of four lines: one where oil is packed into 35 lb. jugs in a cardboard boxes; one where it gets packed as a 50 lb. cube; one where oil gets packed into 5-quart bottles; and a so-called OLE line where oil get packed in different types of smaller bottles. Among the packaging employees, some work as relievers, votator operators, filler operators, or depalletizers. Relievers are responsible for filling in and relieving anyone in the lines, votator operators operate a particular machine that adjusts the viscosity of the oil, filler operators operate the machines in the line, and depalletizers remove boxes from pallets. Other packaging employees use forklifts to move the packaged oil to a warehouse area.

Thereafter, the oil gets shipped out by employees in the shipping department. Shipping employees either load trucks with finished product or perform clerical work related to shipping.

The receiving department handles the purchase and receipt of raw materials. The purchaser coordinates the purchase of raw materials while the other receiving employees operate forklifts to unload and store the material at the facility.

Stephanie Puig ("Puig") is the supervisor of the terminal, packaging, shipping, and receiving departments. In those departments, Puig is responsible for issuing any necessary discipline. She is also involved in hiring for those departments. Employees go to her to request time off, and she approves vacation requests. She is also responsible for conducting performance appraisals for those employees.

B. Packaging Leads Jaime Sedano and Rafael Rodriguez[7]

There are two leads in the packaging department; Jaime Sedano ("Sedano"), first-shift lead, and Rafael Rodriguez ("Rodriguez"), the second-shift lead. Their duties are to monitor the

[7] Neither of these two leads testified at the hearing.

schedule for the lines in packaging. The record evidence is not clear as to what "monitoring" the packaging lines entails. The packaging leads also take oil samples to the lab. In addition, they monitor orders in the computer system and perform other computer functions. They can operate the machines in the packaging area.

1. Jaime Sedano

a. Transfer / Recommendation to transfer

The Petitioner presented Carlos Hernandez ("Hernandez"), a receiving-department employee, as a witness at the hearing. According to Hernandez, Sedano transferred him from the packaging department to receiving department about three months ago. In this regard, Hernandez testified that Sedano told him to "go and help at receiving" and left him there. Hernandez admitted that he does not know whether Sedano received instructions from someone else to transfer him. Hernandez testified that Sedano simply told him to "go help" in receiving.

At the hearing, the Petitioner also presented employee Carlos Alban ("Alban"), who testified that Sedano told him that Sedano was going to recommend him for his current position as purchaser in the receiving department. The record is not clear as to when this conversation took place.[8] According to Alban, Sedano was the purchaser before Sedano was promoted to be a lead. Alban testified that Sedano trained Alban for two weeks for the purchaser job sometime before the official announcement was made that Sedano was going to become the packaging lead. Alban further testified that Sedano told him, "You know what, I will put my word, you know, for you to be the purchaser."

At the hearing, Alban also stated that he submitted an application for this job, and that he was interviewed by Plant Manager Jesus Valadez, Project Engineer Linsay Farrell, and

[8] Alban has worked as a purchaser for about 7 months. Presumably, the conversation happened around that time. Prior to becoming a purchaser, Alban worked in another area at the facility.

Sedano. On cross-examination, Alban admitted that he does not know what weight was given to Sedano's recommendation in the decision to move him to his current position.[9]

b. Assignment of overtime

Employee Israel Ramirez testified that Sedano has sometimes told him that he has to come in on Saturday to work overtime, but that most of the time the Employer asks for volunteers to work overtime. On rebuttal, Puig testified that the overtime schedule is made by Kelli Stiver, the production scheduler. If production is running behind, Stiver consults with Puig to determine whether overtime is necessary to catch up. The Employer tries to give employees advance notice of overtime. However, when enough notice cannot be provided, the Employer will solicit volunteers. According to Puig, Sedano's only role in this process is to write down the names of those who volunteer, and submit them to her for approval of payroll.

c. Assignment of work

The only evidence of Sedano's involvement in the assignment of work was adduced by certain questions asked by the hearing officer during Puig's testimony. Puig testified that packaging leads have assigned other workers to do certain specific task such as to go dump reprocessed oil.

2. Rafael Rodriguez

As noted above, Puig testified that packaging leads (Sedano and Rodriguez) may assign employees to go dump reprocessed oil. There is no other evidence in the record specifically pertaining to Rodriguez's duties as a lead.

[9] Puig, who was not working at the facility during the time that Alban was hired as the purchaser, testified that she does not know who approved his transfer.

C. Shipping Lead Raymond Ramirez[10]

The shipping department has one lead, Raymond Ramirez ("Ramirez"). All employees in that department work the first shift. There are a few hours during the shift when Puig is not onsite, and shipping lead Ramirez monitors the operation of the department. The record contains limited evidence detailing what Ramirez does to monitor the department. This evidence primarily comes from Puig's testimony. For example, on cross-examination, Puig testified that if a fight breaks out among shipping employees when she is away, the shipping lead will call her. She will then decide whether anyone should be sent home.

During examination by the hearing officer, Puig testified that Ramirez has assigned others to do inventory checks. Inventory is routinely checked once the end of each month for accounting purposes, but Ramirez can assign someone to do an inventory check at other times if needed. Puig further testified that Ramirez can also assign employees to move product from one area of the warehouse to another. According to Puig, Ramirez spends much of his time on what the Employer calls "Idoc failures," which means correcting computer-system communication failures. There is no other evidence in the record describing Ramirez's duties.

D. Other Evidence Related to the Supervisory Status of Leads.

Employee Alban testified that he was initially hired to work at the Employer's facility as lead-temporary worker through a staffing agency two years ago. Alban testified that when he was a lead, he fired a worker "on the spot." The record does not indicate precisely when this happened. The worker that he fired was a temporary employee who got into a fight with another temporary worker. No further details of this incident were provided at the hearing.

[10] Raymond Ramirez did not testify at the hearing.

Alban also testified that when he worked as a lead, he was not referred to as a "Supervisor One." He claims that he first heard this phrase from a manager named Mike Mattingly[11] about two weeks prior to the hearing in this case. According to Alban, he and Mattingly were discussing the Union when Mattingly mentioned that the leads were considered level-one supervisors. No other employee testified that leads are known as "level-one supervisors," and no employees testified that they view their leads as supervisors.

ANALYSIS

A. Section 2(11) Supervisor Legal Frame Work

The Petitioner asserts that the packaging and shipping leads are statutory supervisors as defined by Section 2(11) of the Act. The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). Section 2(11) of the Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment.

Under Board and Supreme Court precedent, in order to be a statutory supervisor, an individual must have the authority to effectuate or effectively recommend at least one of the supervisory indicia enumerated in Section 2(11) of the Act, using independent judgment in the interest of the employer. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001)).

[11] The record is not clear as to who is Mike Mattingly. He was described by Alban as the plant manager's boss.

Supervisory status must be established by a preponderance of the evidence. *Oakwood Healthcare, Inc.*, supra at 694. Lack of evidence is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). "[W]henever the evidence is in conflict or otherwise inconclusive on particular indicia or supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Further, job descriptions and job titles are only paper authority and are not given any controlling weight by the Board. *Avante at Wilson, Inc.*, id.; *Training School at Vineland*, 332 NLRB 1412, 1416 (2000).

In the instant case, the Petitioner has failed to meet its burden in establishing the supervisory status of the packaging and shipping leads. None of the packaging and shipping leads were presented at the hearing to testify with respect to their day-to-day duties. Only three employee witnesses testified regarding the duties of the leads to whom they allegedly report, but their testimony lacked detail. The record in general is devoid of detailed evidence as to the responsibilities and duties of the leads. Instead the Petitioner relied largely on general conclusionary statements made by the employee witnesses, and limited testimonial evidence adduced by the Petitioner during Puig's cross-examination.

The Petitioner claims that the leads are referred to by the Employer as level-one supervisors. But, the only evidence presented to support this claim was Alban's testimony that Manager Mike Mattingly made a comment to that effect. This evidence is insufficient to prove

this allegation. Although the Petitioner presented four employee witnesses, none of them testified that the leads are known as level-one supervisors or that they view their leads as supervisors. Moreover, as the Petitioner correctly noted in its brief, supervisory status is determined by an individual's duties, not by his job title or classification. As discussed below, the record evidence regarding the leads' duties failed to establish that the leads are supervisors.

B. Packaging Lead Jaime Sedano

The Petitioner contends that the packaging leads are supervisors because they can assign employees to perform specific duties, assign employees to specific departments, and assign overtime.

However, the only evidence presented regarding the packaging leads' involvement in the assignment of work was through Puig's testimony when she stated that packaging leads can ask employees to go "dump reprocessed oil." No specific examples or direct evidence of work assignments by the packaging leads were presented. Without other evidence, the act of simply asking employees to dump oil does not rise to the level of independent judgment necessary to establish that the leads exercise the requisite statutory authority to assign or direct. Accordingly, the record evidence is insufficient to establish these indicia.

As to the alleged assignment of employees to specific departments, employee Hernandez testified that Sedano transferred him from the packaging department to the receiving department. But, the only other detail provided about Sedano's involvement in this transfer was that Sedano told Hernandez to "go help out in receiving." Hernandez admitted that he did not know whether Sedano was following instructions from someone above him. The record evidence does not establish who made the decision to transfer Hernandez, nor does it fully describe the extent of

Sedano's role in the transfer. Accordingly, this evidence is insufficient to show that Sedano and the other leads have authority to transfer or reassign workers to different departments.

The Petitioner also claims that leads can effectively make hiring recommendations. In this regard, employee Alban testified that before it was officially announced that Sedano was going to become a lead, Sedano trained Alban for the position of purchaser, a position held by Sedano before he became a lead. Alban testified that Sedano told him, "I will put my word, you know, for you to be the purchaser." It is not clear on the record whether Sedano made this statement before or after he became a lead. Alban admitted that he submitted an application for the purchaser position, and that he was interviewed by the plant manager along with a project engineer and Sedano. However, the record lacks any details regarding the alleged interview or the extent of Sedano's participation in it. Accordingly, without context and explanation, I cannot find that Sedano effectively made a hiring recommendation. [12]

Likewise, there is insufficient evidence to conclude that leads have authority to assign overtime. The only evidence presented in support of this claim is employee Israel Ramirez's testimony that Sedano has sometimes told him that he has to come in on Saturdays, but that now the Employer seeks volunteers most of the time. The Petitioner did not present any further details regarding the assignment of overtime. On rebuttal, Puig testified that the lead's role in scheduling overtime is to solicit and write down the names of employees who volunteer for overtime. Thus, the record evidence failed to establish that leads assign overtime. Where there is

[12] Nor can I conclude that the leads have authority to discharge employees as contended by the Petitioner. Although employee Alban testified that he fired a temporary employee when he was a lead sometime around one or two years ago, Alban provided very limited details of this event. Even if Alban exercised independent authority to discharge an employee, that would be insufficient to establish that the current leads at issue in this case (Sedano, Rodriguez, and Ramirez) have the authority to discharge.

inconclusive evidence, the party asserting supervisory status has failed to meet its burden. *Dean & Deluca New York, Inc.*, 338 NLRB at 1048.

The Petitioner did not present other evidence of Sedano's supervisor authority. Therefore I find that Petitioner failed to meet its burden to prove that Sedano is a supervisor as defined in Section 2(11) of the Act.

C. Packaging Lead Rafael Rodriguez

The only record evidence regarding the duties of packaging lead Rodriguez was testimony by Puig stating that packaging employees (Sedano and Rodriguez) can assign employees to go "dump reprocessed oil." For the reasons discussed above, this evidence is insufficient to establish that the packaging leads are statutory supervisors. Therefore, I find that the Petitioner failed to meet its burden to prove that Rodriguez is a supervisor as defined in Section 2(11) of the Act.

D. Shipping Lead Raymond Ramirez

The Petitioner suggests that leads are supervisors because they monitor the operations of their department and are accountable for their performance when Puig is away from the plant. Puig admitted that she is away from the facility during a portion of the shipping department's shift, and acknowledged that the shipping lead (Ramirez) monitors the department during this time. However, no evidence was produced by the Petitioner to explain what Ramirez does to "monitor" the department.

The only other evidence that was presented regarding Ramirez's duties was Puig's testimony that Ramirez can assign employees to do inventory checks or to move product from one part of the warehouse to another. This limited evidence suggests that these assignments are merely routine and ministerial. Thus, the evidence is insufficient to show that Ramirez exercised

any supervisory authority. Therefore, I find that the Petitioner failed to meet its burden to prove that shipping lead Ramirez is a Section 2(11) supervisor as defined in the Act.

CONCLUSION

Based on the entire record in this matter and in accordance with the discussion above, I find and conclude that:

1. The hearing officers' rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner did not meet its burden of establishing that the packaging and shipping leads are supervisors as defined in Section 2(11) of the Act. Therefore, the petitioned-for unit is inappropriate because it excludes the packaging and shipping leads.

5. Since the Petitioner does not wish to proceed to an election in any alternate unit if the petitioned-for unit was deemed to be inappropriate, I hereby dismiss the Petition.

ORDER

IT IS HEREBY ORDERED that the Petition in this matter, be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by September 25, 2014. The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov,[13] but may not be filed by facsimile.

DATED at Los Angeles, California, this 11th day of September, 2014.

Olivia Garcia
Regional Director, Region 21
National Labor Relations Board

[13] To file the request for review electronically go to www.nlrb.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlrb.gov.

Exhibit 2

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 21

In the Matter of:

Cargill, Inc., Case No. 21-RC-133636

Employer,

and

United Food & Commercial
Workers Union Local No. 324,

Petitioner.

Place: Los Angeles, California

Dates: August 12, 2014

Pages: 1 through 274

Volume: 1

OFFICIAL REPORTERS

AVTranz
E-Reporting and E-Transcription
845 North 3rd Avenue
Phoenix, AZ 85003
(602) 263-0885

leads and that Steve Lim are supervisors under the Act and maintains that they are employees under the Act.

Can the parties briefly restate their positions regarding the outstanding issues for the record? And whoever wants to go first.

MR. CANTORE: I will repeat the position that --

HEARING OFFICER MEZA: Okay.

MR. CANTORE: -- the leads are supervisors, that the packaging, shipping and receiving is an appropriate unit. And we also do not believe that one additional employee, Kimberly Cruz, is in the packaging unit even though she's listed here. She works in engineering, works on the other side of the tracks and I don't know why she's in packaging.

HEARING OFFICER MEZA: Okay. Wait. So are you raising a whole new issue at this time?

MR. CANTORE: I am saying we're going to challenge her when she votes.

HEARING OFFICER MEZA: Okay.

MR. CANTORE: Nothing more than that.

HEARING OFFICER MEZA: Okay. That's all you're saying?

MR. CANTORE: Yes.

HEARING OFFICER MEZA: Okay. All right. Okay. Anything else? Okay. Mr. Topolski?

MR. TOPOLSKI: Our -- our position hasn't changed since the beginning of the hearing. I believe that the Union -- that the

HEARING OFFICER MEZA: Off the record then?

MR. CANTORE: -- we want to go forward in another unit, and now he's having second thoughts. So why don't we --

HEARING OFFICER MEZA: Do we need to go off the record?

MR. CANTORE: We need to go off the record --

HEARING OFFICER MEZA: Okay.

MR. CANTORE: -- for a minute.

HEARING OFFICER MEZA: Off the record.

MR. CANTORE: That's fine.

(Off the record at 3:46 p.m.)

HEARING OFFICER MEZA: Okay. On the record.

Okay. So, Mr. Cantore, you were just discussing off the record whether you wanted to change your --

MR. CANTORE: I would not.

HEARING OFFICER MEZA: -- position on accepting an alternate unit. Okay. So, no?

MR. CANTORE: No.

HEARING OFFICER MEZA: Your answer's still the same? Okay. All right. Let's see here. Okay. So I think the last question was whether there's anything further the parties desire to present.

MR. CANTORE: And the answer's no.

MR. TOPOLSKI: The answer's no.

HEARING OFFICER MEZA: Okay. So both parties stated no.

And do the parties wish to waive the filing of briefs?

MR. CANTORE: No.

MR. TOPOLSKI: No.

HEARING OFFICER MEZA: Okay. And the briefs will be due -- briefs will be due on August 19th, 2014. And that's seven days from today, correct? All right.

Okay. Mr. Topolski, have all exhibits been offered?

MR. TOPOLSKI: Yes.

HEARING OFFICER MEZA: Okay. And, Mr. Cantore, have all exhibits --

MR. TOPOLSKI: Let's check the record.

HEARING OFFICER MEZA: -- been offered?

MR. TOPOLSKI: Exhibits 1 and 2 is all I have. I believe they've been offered and introduced, correct? Were they?

HEARING OFFICER MEZA: Yes. Okay.

MR. CANTORE: And all of mine, two exhibits?

HEARING OFFICER MEZA: Okay. So both Employer's Exhibit 1 and 2 have been received and Petitioner's Exhibit 1 and 2 have been received into the record. Okay. So if there is nothing further, the hearing will be closed.

MR. TOPOLSKI: Yeah.

MR. CANTORE: Yeah.

HEARING OFFICER MEZA: Hearing no response, the hearing is now closed.

(Whereupon, the hearing in the above-entitled matter was closed at 3:54 p.m.)

Exhibit 6

Gilbert & Sackman

A LAW CORPORATION

Established 1945
Robert W. Gilbert (1920-2001)
Kenneth J. Sackman (Retired)

Joseph L. Paller Jr. [1]
Robert A. Cantore [2]
Steven M. Rehaut
Laurie A. Traktman
Jay Smith [3]
Joshua F. Young

Michael D. Weiner
Ryan Spillers
Stephanie J. Joseph [4]
Sean M. Kramer
Travis S. West

3699 Wilshire Boulevard, Suite 1200
Los Angeles, CA 90010-2732
Telephone: 213.383.5600 323.938.3000
Fax: 213.383.1165 323.937.9139
www.gslaw.org

[1] Also admitted in NV, NY & PA
[2] Also admitted in NY
[3] Also admitted in AL
[4] Also admitted in AL & TN

September 25, 2014
Via Electronic and U.S. Mail

William Pate, Acting Regional Director
NLRB, Region 21
888 South Figueroa Street
Ninth Floor
Los Angeles, CA 90017-5455

Re: *Cargill, Inc.*
Case No. 21-RC-136849

Dear Acting Regional Director Pate:

Please consider this letter the response by Petitioner United Food and Commercial Workers, Local Union No. 324, UFCW, AFL-CIO ("Union") to the rather novel device employed by the Employer, Cargill, Inc. ("Employer"), to deprive its employees of their rights under section 7 of the National Labor Relations Act ("Act"), 29 U.S.C. § 157. Specifically, this letter is being sent in opposition to the motion by the Employer to dismiss the instant petition with prejudice, and thus prevent its employees from exercising their right to "join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing."

The Union notes at the outset that, although it ***may*** be true that "nothing [specifically] allows a petitioner to file a completely new petition while a petition filed by the same petitioner addressing the same issues in the same unit at the same employer facility is pending" (Employer's Motion at 7), it is ***certainly*** true that nothing prevents it. Thus, to accomplish its statutorily offensive goal of preventing an election in this case, the Employer has offered absolutely no precedent for the extraordinary relief it seeks. Instead, it has resorted to misstating the current procedural posture of the petition and twisting the Union's positions on issues.

> As this case now stands, the Union has petitioned for a unit consisting of:
>
> All full-time and regular part-time packaging, shipping, and receiving employees employed by the Employer at its facility located at 566 North Gilbert Street, Fullerton, California. (Emphasis added).

Essentially, the Union has petitioned for a traditional unit consisting of "***all*** employees" in the Employer's packaging, shipping, and receiving departments, and has sufficiently demonstrated an interest in this unit.

Admittedly, the Union has not identified ***any*** classification of "employees" that may (or may not) be included in the unit. Although this failure includes the lead classification, it also includes every other classification of employees working in the three departments. And the Union has ***not*** specifically excluded leads (or any other classification) from the petitioned-for unit (as it did in Case No. 21-RC-133636). Indeed, the exclusions from the unit as petitioned for by the Union in this case consist only of:

> All other employees, maintenance employees, terminal employees, quality-control employees, technical employees, staffing agency employees, office clerical employees, guards and supervisors as defined in the National Labor Relations Act. (Emphasis added).

Thus, contrary to the Employer's *ipse dixit* contention, the Union is not seeking to exclude leads from the petitioned-for unit. Indeed, ***if*** leads working in the packaging, shipping and/or receiving departments are "employees" (as the Employer contends they are), then they definitely are included in the petitioned-for unit. Admittedly, however, ***if*** leads are "supervisors as defined in the National Labor Relations Act" (as the Union contends), then they may be excluded. Thus, the real issue raised by the Employer's unorthodox motion is ***not*** whether the petition should be dismissed (there is absolutely no authority for such an outrageous result), but whether the Union should be allowed to raise the issue of the leads' supervisory status in this petition after having lost the issue in Case No. 21-RC-133636. And the answer to this question is, it doesn't have to be decided, at least not now.

What makes this petition different from any other petition is only the Regional Director's Decision and Order in Case No. 21-RC-133636, where she concluded that the Union had not met its burden of proving the supervisory status of the Leads. Absent

this decision, the "standard" procedure would be to count the number of employees in the petitioned-for unit and the number of individuals at issue. The Region would then decide whether their status needed to be decided before an election is held or afterwards (and then only if their votes could determine the outcome of the election). Given that the three leads at issue are less than 10% of the petitioned-for unit, the "standard" procedure would be to allow the leads to vote subject to the Union's challenge and to wait and see if a determination needs to be made.

But according to the Employer, the decision in Case No. 21-RC-133636 has precluded the Union from raising the issue of the supervisory status of the leads in this proceeding, and thus the petition must be dismissed. But why? One simply does not flow logically from the other.

If the Region agrees with the Employer that the Union is precluded from raising the status of leads issue again, then the obvious solution would be to count any ballots they may cast in the election, ***not*** to dismiss the petition and deny all employees their section 7 rights. Besides, following proper briefing, the Region could decide that, for public policy reasons – such as those stated in Congress's decision to exclude supervisors (who may hire, fire and otherwise discipline employees or effectively recommend the same) from a unit of employees – and because this is not an adversarial proceeding, a decision based solely upon the failure to prove the issue of supervisory status should not bar raising the same issue in a subsequent proceeding, even if it involves the same union and the same employer. But perhaps most importantly, the Region need not make this decision now.

Given that today is the last day to seek review of the Decision and Order in Case No. 21-RC-133636 and that the Union has waived its right to seek review, there are only two possibilities left. By the time the Region considers the Employer's motion and this opposition, either the Decision and Order will have become "final" and the petition dismissed (*see* 29 CFR § 102.67(b)) or the Employer will have filed its own request for review of a issue that it won. If the former, the Region should simply proceed with the petition as it would with any other petition. If the latter, the Region should recognize the Employer's request for what it is, a baseless attempt to delay the election where the best it could hope to obtain on review would be a stronger statement by the Board that the Union had failed to meet its burden in the earlier proceeding. Under either scenario, the Region could and should simply allow the leads the opportunity to vote subject to challenge by the Union. Only if their votes could determine the outcome of the election would it then be necessary for the Region to resolve any of these novel issues.

In sum, there is absolutely no reason to delay the proceedings any longer, much less to dismiss the petition entirely.

Very truly yours,

Gilbert & Sackman, a Law Corporation

By: _____
Robert A. Cantore

cc: Douglas M. Topolski, Esq.
Sylvia Mesa, Board Agent
Greg Conger
Andrea Zinder
Gilbert Davila

LWP1.324.wpd

Exhibit 7

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

CARGILL, INC.

Employer

and

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 324

Case No. 21-RC-136849

Petitioner

EMPLOYER'S REPLY TO UNION'S OPPOSITION TO MOTION TO DISMISS THE PETITION WITH PREJUDICE

Employer, Cargill, Inc. ("Employer" or "Cargill"), through undersigned counsel, respectfully replies to the Union's Opposition (attached hereto as Exhibit 3[1] and referred to herein as the "Opposition") to the Employer's Motion to Dismiss the Petition with Prejudice (hereinafter "Employer's Motion"). For the reasons discussed below, as well as those brought to the attention of Regional Director previously, the Employer's Motion to Dismiss the Petition with Prejudice should be granted. Additionally, the hearing scheduled for October 2, 2014 should be cancelled immediately.

ARGUMENT

The Employer's Motion establishes beyond any serious debate that the Board's Rules and Regulations, applicable legal principles, and the *Casehandling Manual* all require dismissal of the instant petition with prejudice. The Union's opposition confirms this conclusion. Indeed, the Union does not address, much less attempt to challenge, any of the sound legal principles and

[1] The Exhibit attached hereto is numbered to follow sequentially those attached to the Employer's Motion. The Union's Opposition is attached hereto because it was presented as letter attached to an e-mail. Thus, it is unclear whether the Opposition has been made a formal part of the record in this matter.

arguments advanced by the Employer. Instead, the Union relies upon nothing more than contradictory and internally inconsistent assertions to suggest that it should be permitted to re-litigate the issues it either raised and lost or waived in Case No. 21-RC-133636. The Regional Director should reject this transparent and unsuccessful attempt at obfuscation for what it is and dismiss the petition with prejudice.

Thus, the Union claims that "...it has not specifically excluded leads (or any other classification) from the petitioned for unit (as it did in Case No. 21-RC-133636)." Opposition at 2. This contention is misleading if it is not false. Immediately after making this assertion, the Union concedes that its defined exclusions to the unit set out in its petition contain, among others, "all other employees" (other than the packaging, shipping, and receiving employees it seeks exclusively in this case and sought exclusively in 21-RC-133636) and supervisors. It then goes on to opine that since the lead operators comprise less than 10% of the unit it seeks, "...the "standard" procedure would be to allow the leads to vote subject to the Union's challenge and wait and see if a determination needs to be made." Opposition at 3. Thus concludes the Union, "...the Region could and should simply allow the leads to vote subject to challenge by the Union." *Id.*

These representations make clear that the Union at this time is still is seeking only one unit consisting only of packaging, shipping and receiving employees. The Union expressly excludes "all others" and the lead operators because the Union still contends they are supervisors. There would be no other reason to suggest that leads vote subject to challenge if this was not the case. No amount of double talk can hide this unambiguous position.

Thus, the Union seeks in this case right now *exactly* the unit the Regional Director found *not appropriate* in Case No. 21-RC-133636. Exhibit 1. When the petition presents a unit that it

is not appropriate on its face, it must be dismissed. *Casehandling Manual* (CMH) Section 11011. Thus, and contrary to the Union's notion that the supervisory status of the leads "...doesn't have to be decided, at least not now (Opposition at 2)...", the Union's failure to concede expressly and immediately that the leads are not supervisors and are a part of any appropriate unit renders the petition defective on its face. Exhibit 1 and CMH section 11101. The Union should not be permitted any further opportunities to pursue its vexatious posture. This petition should be dismissed now and for this reason alone.

Moreover, and in any event, it does not matter what position the Union might ultimately take on any unit proposal in this proceeding. It had the opportunity to fully litigate all unit issues concerning its first request for an election at the Employer's Fullerton facility in Case No. 21-RC-133636. The Union let the matter proceed to a hearing. Even at the hearing, the Union was provided a recess to reconsider its position on the unit. It chose not to do so. At any time prior to the close of the hearing or an election agreement, it could have withdrawn its petition and sought to re-file without prejudice. *See* CHM Section 11111. It chose not to do so. Even after the Decision and Order was issued, the Union could have sought to reopen the record, move for reconsideration or file a request for review of the Regional Director's decision. It chose to do none of these things.

Thus, pursuant to the Board's Rules and Regulations, the decision of the Regional Director in Case No. 21-RC-133636 is now "final." 29 CFR Section 102.67(b). The petition in Case No. 21-RC-133636 is dismissed. This dismissal is correctly treated as one with prejudice. The *Casehandling Manual* makes clear that the purpose of dismissing a petition with prejudice is to avoid exactly what the Union is doing in this case. "The purpose of levying prejudice is to

conserve the Agency's resources by discouraging repetitive and duplicate filings." CMH section 11118.

The Union cannot be permitted to:

- consciously take a position at a representation hearing after being given multiple opportunities to alter that position;
- after that hearing has closed and the decision has been issued, file a new petition seeking to raise the same issues in the same unit at the same facility while intentionally declining to utilize the established procedures for seeking a review of the decision rendered in the first hearing;
- ignore the decision rendered in the first hearing in its entirety;
- and then brazenly contend that it is entitled to re-litigate the very issues it chose not appeal without the prescribed prejudice penalty for no other reason than it did not like the outcome of the first proceeding and has no viable grounds to challenge them.

It is not an overstatement to say that allowing the Union to do this in the circumstances of this case would make a mockery of the procedures for reconsideration and review set out in the Board's Rules and Regulations and Casehandling Manual. It would also constitute nothing less than an arbitrary and blatant denial of the Employer's constitutional due process rights. Further, allowing the Union to proceed in this case would also constitute a violation of Sections 3(b) and 9(c) of the Act which require the Board and those to whom authority is delegated in representation matters to act in accordance with the both the statute and the Board's regulations.

In the final analysis, the Union's claim that "it is certainly true that nothing prevents" the Union's instant petition is false. To the contrary, every applicable principle prevents the Union

from proceeding in this matter while it remains true that nothing permits or condones the Union's conduct. Thus, the Union literally offers nothing to refute these sound principles and conclusions:

- The Regional Director's Decision and Order in Case No. 21-RC-133636 is final in the absence of a proper challenge by the Union in the manner required by the Board's regulations;
- The Board's Rules and Regulations set out the exclusive methods for seeking reconsideration or review of the Regional Director's Decision and Order in Case No. 21-RC-133636;
- The Union did not seek reconsideration or review of the Regional Director's Decision and Order in Case No. 21-RC-133636;
- The Board's Rules and Regulations, policies and case law abhor and do not tolerate duplicative, repetitive, vexatious and piecemeal litigation;
- The Petition in Case No. 21-RC-133636 was properly dismissed with prejudice; and
- Allowing the Union to pursue its stated purpose of re-litigating exactly the same issues concerning the same unit with the same employer at the same location that it raised or could have raised in Case No. 21-RC-133636 just days after receiving a Decision and Order in that case violates the Board's Rules and Regulations, policies, statutory responsibilities, and the Employer's constitutional due process rights.

For these and all the reasons brought to the attention of the Regional Director, the instant petition should be dismissed immediately and with prejudice. Because the petition should be

dismissed, the hearing currently scheduled for October 2, 2014 should be cancelled immediately to avoid further waste of resources associated with this duplicative and vexatious proceeding.

CONCLUSION

For the reasons set forth above, as well as those brought to the attention of the Regional Director previously, the Employer's Motion to Dismiss the Petition with Prejudice should be granted. The petition should be dismissed with prejudice and Petitioner should not be permitted to file a petition for any election in a production and maintenance unit at Employer's Fullerton, California facility for a period of six months from the date of the Order dismissing this petition. Further, the hearing scheduled in this matter for October 2, 2014 should be cancelled.

Respectfully submitted,

/s/

Douglas M. Topolski, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1909 K. Street, N.W., Suite 1000
Washington, DC 20006
(202) 263-0242

Ruthie L. Goodboe, Esq.
Sarah M. Rain, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
34977 Woodward Avenue, Suite 300
Birmingham, MI 48009
(248) 593-6400

Attorneys for Cargill, Inc.

19049572.1

EXHIBIT 3

EXHIBIT 3

Gilbert & Sackman
A LAW CORPORATION

Established 1945
Robert W. Gilbert (1920-2001)
Kenneth J. Sackman (Retired)

Joseph L. Paller Jr. [1]
Robert A. Cantore [2]
Steven M. Rehaut
Laurie A. Traktman
Jay Smith [3]
Joshua F. Young

[1] Also admitted in NY, NY & PA
[2] Also admitted in NY

Michael D. Weiner
Ryan Spillers
Stephanie J. Joseph[4]
Sean M. Kramer
Travis S. West

[3] Also admitted in AL
[4] Also admitted in AL & TN

3699 Wilshire Boulevard, Suite 1200
Los Angeles, CA 90010-2732
Telephone: 213.383.5600 323.938.3000
Fax: 213.383.1165 323.937.9139
www.gslaw.org

September 25, 2014
Via Electronic and U.S. Mail

William Pate, Acting Regional Director
NLRB, Region 21
888 South Figueroa Street
Ninth Floor
Los Angeles, CA 90017-5455

Re: *Cargill, Inc.*
Case No. 21-RC-136849

Dear Acting Regional Director Pate:

Please consider this letter the response by Petitioner United Food and Commercial Workers, Local Union No. 324, UFCW, AFL-CIO ("Union") to the rather novel device employed by the Employer, Cargill, Inc. ("Employer"), to deprive its employees of their rights under section 7 of the National Labor Relations Act ("Act"), 29 U.S.C. § 157. Specifically, this letter is being sent in opposition to the motion by the Employer to dismiss the instant petition with prejudice, and thus prevent its employees from exercising their right to "join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing."

The Union notes at the outset that, although it ***may*** be true that "nothing [specifically] allows a petitioner to file a completely new petition while a petition filed by the same petitioner addressing the same issues in the same unit at the same employer facility is pending" (Employer's Motion at 7), it is ***certainly*** true that nothing prevents it. Thus, to accomplish its statutorily offensive goal of preventing an election in this case, the Employer has offered absolutely no precedent for the extraordinary relief it seeks. Instead, it has resorted to misstating the current procedural posture of the petition and twisting the Union's positions on issues.

> As this case now stands, the Union has petitioned for a unit consisting of:
>
> All full-time and regular part-time packaging, shipping, and receiving employees employed by the Employer at its facility located at 566 North Gilbert Street, Fullerton, California. (Emphasis added).

Essentially, the Union has petitioned for a traditional unit consisting of "***all*** employees" in the Employer's packaging, shipping, and receiving departments, and has sufficiently demonstrated an interest in this unit.

Admittedly, the Union has not identified ***any*** classification of "employees" that may (or may not) be included in the unit. Although this failure includes the lead classification, it also includes every other classification of employees working in the three departments. And the Union has ***not*** specifically excluded leads (or any other classification) from the petitioned-for unit (as it did in Case No. 21-RC-133636). Indeed, the exclusions from the unit as petitioned for by the Union in this case consist only of:

> All other employees, maintenance employees, terminal employees, quality-control employees, technical employees, staffing agency employees, office clerical employees, guards and supervisors as defined in the National Labor Relations Act. (Emphasis added).

Thus, contrary to the Employer's *ipse dixit* contention, the Union is not seeking to exclude leads from the petitioned-for unit. Indeed, ***if*** leads working in the packaging, shipping and/or receiving departments are "employees" (as the Employer contends they are), then they definitely are included in the petitioned-for unit. Admittedly, however, ***if*** leads are "supervisors as defined in the National Labor Relations Act" (as the Union contends), then they may be excluded. Thus, the real issue raised by the Employer's unorthodox motion is ***not*** whether the petition should be dismissed (there is absolutely no authority for such an outrageous result), but whether the Union should be allowed to raise the issue of the leads' supervisory status in this petition after having lost the issue in Case No. 21-RC-133636. And the answer to this question is, it doesn't have to be decided, at least not now.

What makes this petition different from any other petition is only the Regional Director's Decision and Order in Case No. 21-RC-133636, where she concluded that the Union had not met its burden of proving the supervisory status of the Leads. Absent

this decision, the "standard" procedure would be to count the number of employees in the petitioned-for unit and the number of individuals at issue. The Region would then decide whether their status needed to be decided before an election is held or afterwards (and then only if their votes could determine the outcome of the election). Given that the three leads at issue are less than 10% of the petitioned-for unit, the "standard" procedure would be to allow the leads to vote subject to the Union's challenge and to wait and see if a determination needs to be made.

But according to the Employer, the decision in Case No. 21-RC-133636 has precluded the Union from raising the issue of the supervisory status of the leads in this proceeding, and thus the petition must be dismissed. But why? One simply does not flow logically from the other.

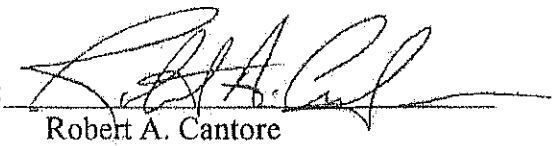
If the Region agrees with the Employer that the Union is precluded from raising the status of leads issue again, then the obvious solution would be to count any ballots they may cast in the election, ***not*** to dismiss the petition and deny all employees their section 7 rights. Besides, following proper briefing, the Region could decide that, for public policy reasons – such as those stated in Congress's decision to exclude supervisors (who may hire, fire and otherwise discipline employees or effectively recommend the same) from a unit of employees – and because this is not an adversarial proceeding, a decision based solely upon the failure to prove the issue of supervisory status should not bar raising the same issue in a subsequent proceeding, even if it involves the same union and the same employer. But perhaps most importantly, the Region need not make this decision now.

Given that today is the last day to seek review of the Decision and Order in Case No. 21-RC-133636 and that the Union has waived its right to seek review, there are only two possibilities left. By the time the Region considers the Employer's motion and this opposition, either the Decision and Order will have become "final" and the petition dismissed (*see* 29 CFR § 102.67(b)) or the Employer will have filed its own request for review of a issue that it won. If the former, the Region should simply proceed with the petition as it would with any other petition. If the latter, the Region should recognize the Employer's request for what it is, a baseless attempt to delay the election where the best it could hope to obtain on review would be a stronger statement by the Board that the Union had failed to meet its burden in the earlier proceeding. Under either scenario, the Region could and should simply allow the leads the opportunity to vote subject to challenge by the Union. Only if their votes could determine the outcome of the election would it then be necessary for the Region to resolve any of these novel issues.

In sum, there is absolutely no reason to delay the proceedings any longer, much less to dismiss the petition entirely.

Very truly yours,

Gilbert & Sackman, a Law Corporation

By: 
Robert A. Cantore

cc: Douglas M. Topolski, Esq.
Sylvia Mesa, Board Agent
Greg Conger
Andrea Zinder
Gilbert Davila

LWP1.324.wpd

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of September, 2014 the foregoing Employer's Reply to Union's Opposition to Motion to Dismiss the Petition with Prejudice was filed electronically and that service copies were sent by federal express and electronic mail to:

United Food & Commercial Workers
International Union, Local 324
8530 Stanton Ave
Buena Park, CA 90620

Robert A. Cantore, Esq.
Gilbert & Sackman
3699 Wilshire Blvd Suite 1200
Los Angeles, CA 90010
rac@gslaw.org

William M. Pate, Acting Regional Director
National Labor Relations Board, Region 21
888 S. Figueroa Street, 9th Floor
Los Angeles, California 90017
William.pate@nlrb.gov

Sylvia Meza, Field Examiner
National Labor Relations Board, Region 21
888 S. Figueroa Street, 9th Floor
Los Angeles, California 90017
Sylvia.Meza@nlrb.gov

/s/
Douglas M. Topolski

Exhibit 8

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

CARGILL, INC.

Employer

and

Case 21-RC-136849

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 324

Petitioner

ORDER DENYING EMPLOYER'S MOTION TO DISMISS PETITION WITH PREJUDICE

On September 24, 2014, the Employer filed a Motion to Dismiss the Petition with Prejudice. On September 25, 2014, the Petitioner filed a letter in opposition to the Employer's motion, and on September 26, 2014, the Employer filed a Reply to Union's Opposition to Motion to Dismiss the Petition.

In its motion and its reply, the Employer contends that the unit sought in this matter is identical to the unit sought by the Petitioner in Case 21-RC-133636, and that dismissal of the instant petition is warranted because it was determined in Case 21-RC-133636 that the unit sought by the Petitioner was inappropriate. The Employer further contends that the Board's Rules and Regulations prohibit the Petitioner from filing a new petition concerning the same unit of the Employer's employees while the first petition is pending, and prohibit the Petitioner from filing a new petition to re-hear or re-open the record in Case 21-RC-133636, or to seek reconsideration of the Decision and Order in that case. The Employer also asserts that the new petition is an effort to litigate issues in an untimely or piecemeal fashion.

The petition in this matter was filed on September 16, 2014. The petition in Case 21-RC-133636 was filed by the Petitioner on July 28, 2014. In a September 11, 2014 Decision and Order, I dismissed the petition in Case 21-RC-133636, after concluding that the Petitioner did not meet its burden of establishing that the packaging and shipping leads it sought to exclude from the unit are supervisors as defined in Section 2(11) of the Act, and because the Petitioner

did not wish to proceed to an election in any alternate unit if the petitioned-for unit was deemed to be inappropriate.

Contrary to the Employer's contentions, dismissal of the instant petition is not warranted simply because it was determined in Case 21-RC-133636 that the petitioned-for unit was inappropriate or because, pursuant to the Board's Rules and Regulations, the Regional Director's decision is final. The Board's Rules and Regulations do not prohibit the filing of a petition while another petition concerning the same unit has been dismissed pursuant to a Decision and Order and during the period in which a request for review can be filed. In any event, no party requested review of the Decision and Order in Case 21-RC-133636, and that petition is no longer pending. Moreover, if a request for review of the Decision and Order in Case 21-RC-133636 had been filed, the instant petition would have been placed in abeyance and the hearing in this matter scheduled for October 2, 2014, would have been canceled.

Further, the instant petition does not constitute a request to re-hear or re-open the record in Case 21-RC-133636, or a request for reconsideration of the Decision and Order in that case, and the Board's Rules and Regulations in that regard do not apply here, where the Petitioner has filed a new petition and not a motion for reconsideration or a motion to re-hear or re-open the record in Case 21-RC-133636. Likewise, the Employer's argument that the instant petition is an effort to litigate issues in an untimely or piecemeal fashion is misplaced as that argument applies to the litigation of unfair labor practices, not the processing of petitions involving questions concerning representation.

While the Employer contends that the dismissal of the petition in Case 21-RC-133636 should be treated as a dismissal with prejudice and bar the filing of a petition concerning these employees for six months, there is no basis to dismiss a petition with prejudice in the Board's Rules and Regulations or the Board's *Casehandling Manual, Part Two, Representation Proceedings (Casehandling Manual).* The Employer inappropriately relies on *Casehandling Manual* Section 11118 in support of prejudice arguments, but that section concerns prejudice as it applies to the withdrawal of a petition. No such prejudice applies when a petition is dismissed. Moreover, contrary to the Employer's contention, the Petitioner did not disclaim interest in any unit except the one sought in Case 21-RC-133636, but instead stated in that case that it did not wish to proceed to an election in any alternate unit if the it sought was deemed to be

inappropriate. Thus, this is not a situation where a petition has been withdrawn pursuant to an incumbent union's disclaimer of interest, and no prejudice to the filing of a new petition applies.

The Employer's argument that the instant petition should be dismissed under *Casehandling Manual* Section 11011 because it purportedly seeks a unit that is inappropriate on its face is also misplaced. While the petitioned-for unit is similar to that of the petitioned-for unit as amended at hearing in Case 21-RC-133636, it is not identical and I cannot conclude that the petitioned-for unit in the instant case is inappropriate on its face and that dismissal is warranted at this time.

Finally, for the reasons described above, I reject the Employer's arguments that refusing to dismiss the petition at this time constitutes a denial of due process or a violation of Sections 3(b) or 9(c) of the Act.

ACCORDINGLY, IT IS HEREBY ORDERED that the Employer's Motion to Dismiss the Petition with Prejudice is denied.

Dated: September 26, 2014

/S/OLIVIA GARCIA
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 21
888 S FIGUEROA ST FL 9
LOS ANGELES, CA 90017-5449

Exhibit 9

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 21

In the Matter of:

Cargill, Inc., Case No. 21-RC-136849

Employer,

and

United Food & Commercial
Workers Union, Local NO. 324,

Petitioner.

Place: Los Angeles, California

Dates: October 2, 2014

Pages: 1 through 22

Volume: 1

OFFICIAL REPORTERS

AVTranz
E-Reporting and E-Transcription
845 North 3rd Avenue
Phoenix, AZ 85003
(602) 263-0885

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 21

In the Matter of: CARGILL, INC., Employer, and UNITED FOOD & COMMERCIAL WORKERS UNION, NO. LOCAL 324, Petitioner.	Case No. 21-RC-136849

The above-entitled matter came on for hearing, pursuant to notice, before **SYLVIA MEZA**, Hearing Officer, at the National Labor Relations Board, Region 21, 888 South Figueroa Street, Ninth Floor, Los Angeles, California 90017, on **Thursday, October 2, 2014, at 9:21 a.m.**

A P P E A R A N C E S

On behalf of the Petitioner:

ROBERT A. CANTORE, ESQ.
GILBERT & SACKMAN
3699 Wilshire Boulevard, Suite 1200
Los Angeles, CA 90010
Tel. 323-938-3000
Fax: 323-937-9139

On behalf of the Employer:

DANIEL A. ADLONG, ESQ.
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
Park Tower
695 Town Center Drive, Suite 1500
Costa Mesa, CA 92626
Tel. 714-800-7900
Fax. 714-754-1298

E X H I B I T S

EXHIBIT	IDENTIFIED	IN EVIDENCE
Board:		
B-1(a) through B-1(m)	4	4
B-2	5	5
B-3	15	15
B-4	15	15

P R O C E E D I N G S

HEARING OFFICER MEZA: On the record. The hearing will be in order. This is a formal hearing in the matter of Cargill in case number 21-RC-136849 before the National Labor Relations Board. The Hearing Officer appearing for the National Labor Relations Board is Sylvia Meza.

Will counsel please state their appearances for the record?

For the Petitioner?

MR. CANTORE: Robert A. Cantore of Gilbert & Sackman.

HEARING OFFICER MEZA: For the Employer?

MR. ADLONG: Daniel Adlong, Ogletree, Deakins.

HEARING OFFICER MEZA: Are there any other appearances?

Let the record show no response.

Are there any persons, parties or labor organizations in the hearing room at this time who claim an interest in this proceeding?

Let the record show no further response.

I now propose to receive the formal papers. They have been marked for identification as Board's Exhibit 1(a) through 1(m), inclusive, Exhibit 1(m) being an index and description of the entire exhibit. The exhibit has already been shown to all parties. Are there any objections?

Hearing no objections, the formal papers are received into evidence.

(Board Exhibit Number 1(a) through 1(m) Received into Evidence)

HEARING OFFICER MEZA: I now propose to receive Board Exhibit 2, which covers a number of stipulations between the parties regarding the proper name of the Employer, the Petitioner, commerce, labor organization status, history of bargaining, et cetera. The exhibit has already been shown to all parties. Are there any objections?

MR. CANTORE: No objections.

HEARING OFFICER MEZA: Hearing no objections, Board Exhibit 2 is received into evidence.

(Board Exhibit Number 2 Received into Evidence)

HEARING OFFICER MEZA: Are there any motions to intervene in these proceedings to be submitted to the Hearing Officer at this time?

Let the record show no response.

Does the Employer decline at this time to recognize the Petitioner as exclusive collective bargaining agent for the employees in the petitioned for unit until such time as it or they are certified as search in an appropriate unit determined by the Board?

MR. ADLONG: Yeah, we're not recognizing them as the bargaining representative.

HEARING OFFICER MEZA: Okay. The Petitioner asserts that the following unit is appropriate for the purposes of collective bargaining. And in an off-the-record discussion the Petitioner has indicated that it wishes to amend its petition

as follows: Including, all full-time and regular part-time packaging, shipping and receiving employees employed by the Employer at its facility located at 566 North Gilbert Street, Fullerton, California. Excluded, all other employees, maintenance employees, terminal employees, quality control employees, staffing agency employees, office clerical employees, guards and supervisors as defined in the Act.

Okay. So the amendment is allowed.

Mr. Adlong, what is the Employer's position regarding a petitioned for unit?

MR. ADLONG: Wait. Can you state the amendment, please?

HEARING OFFICER MEZA: Yes. Included, all full-time and regular part-time packaging, shipping and receiving employees employed by the Employer at its facility located at 566 North Gilbert Street, Fullerton, California. Excluded, all other employees, maintenance employees, terminal employees, quality control employees, staffing agency employees, office clerical employees, guards and supervisors as defined in the Act.

MR. ADLONG: Can we just go off the record for one second?

HEARING OFFICER MEZA: Sure. Off the record.

(Off the record at 9:24 a.m.)

HEARING OFFICER MEZA: Okay. So off the record the parties were just discussing the modification or the amendment to the sought after unit, and it was just explained that the technical employees that were in the petition that was filed in this case

were removed because the Union had explained that the -- that was just a term that they were using for the quality control employees. And also it was just noted that the Employer's proper address is 566 North Gilbert Street. So now just moving forward, I'm just going to restate on the record that the amendment to the unit is allowed. And the last question I had posed is -- was to the Employer, and the question was, what is the Employer's position regarding the petitioned for unit?

MR. ADLONG: So our petition on the units -- I mean we made it clear in our post hearing brief in 21-RC-133636 and it's not changed, and we'll just adopt that position by reference in this matter.

HEARING OFFICER MEZA: Okay. All right. And --

MR. ADLONG: I mean --

HEARING OFFICER MEZA: -- the --

MR. ADLONG: And we'd also just put forth that except and to -- like the Union needs to take a position on the leads because they're taking this basically trying to have their cake and eat it too position. So either they need to say, "Hey, these guys are supervisors and they shouldn't be in the" -- "in the unit," and then we already know that its an appropriate unit, or they do that, or they should say they're not. But any limitation that they try to put on by taking the position that, "Oh, they should vote subject to challenge or any way have their rights restrained because of the fact they're contending

that this 211 status remains unresolved is just improper, and that they need to take a position and just stop trying to have it both ways. And we should know because once they say they're 211s, we know that the unit's inappropriate.

HEARING OFFICER MEZA: Okay. All right. And one thing I just wanted to clarify is I think that you incorrectly the stated the prior case number. So you meant 21-RC-133636, correct?

MR. ADLONG: 1 -- I --

HEARING OFFICER MEZA: Either -- I may have misheard you, but --

MR. ADLONG: I have 133636.

HEARING OFFICER MEZA: It's 133636.

MR. ADLONG: 133 -- two 3s, a 6 and a 3 and a 6.

HEARING OFFICER MEZA: Yeah.

MR. ADLONG: Yeah, we're saying the same thing.

HEARING OFFICER MEZA: Okay. Okay. Sorry.

All right. Okay,. And, Mr. Cantore, what is the Petitioner's position regarding the petitioned for unit?

MR. CANTORE: It is totally appropriate.

HEARING OFFICER MEZA: Okay. All right. So now it is my understanding based on off-the-record discussions and communications with the parties that the following issues are under dispute: Issue one, whether the packaging, shipping and receiving employees share an overwhelming community of interest

under specialty healthcare with the maintenance terminal and quality control employees so as to be included in a single unit for the purpose of -- purposes of collective bargaining.

So the question is what is the appropriate unit? The Employer maintains that the appropriate unit consists of packaging, shipping, receiving, maintenance terminal and quality control employees. The Employer is seeking a wall-to-wall unit consisting of about 60 employees. Per the Employer, among the 60 or so employees are packaging lead employees and shipping lead employees. The Employer asserts the employees in these six job classifications all share an overwhelming community of interest and should be in the same bargaining unit.

Per the Employer, included in the group of 60 employees are about four packaging employees, two terminal employees and one plant clerical employee who are scheduled to be transferred to the Fullerton, California facility from the Vernon, California, facility by the end of 2014. The transfer of these seven employees will not be litigated at the hearing as no party is contending that they were seeking a multi-facility unit.

While the Union concedes the six job classifications share some community of interest, it also asserts they barely speak to each other and the Union is satisfied that a unit consisting of only packaging, shipping and receiving employees is appropriate even if not the most appropriate one.

Issue number two: Whether Steve Lim, who works in the quality control department, is a supervisor under the Act. The Union is seeking to exclude Steve Lim on the basis that he's a supervisor under Section 211 of the Act. The Employer denies that Steve Lim is a supervisor under the Act and maintains he is an employee under the Act.

Issue number three: Whether the packaging leads, Jaime Sedano and Rafael Rodriguez, and the shipping lead, Ray Ramirez, are supervisors under the Act. The Union contains they are -- contends they are supervisors under the Act.

Can the Union please state its position regarding inclusion or exclusion of the packaging and shipping leads in the sought after unit?

MR. CANTORE: My position is that if the Regional Director agrees with the Union, that they are supervisors, they should be excluded. In the Regional Director disagrees with the Union and finds that they are employees, then they should be included.

HEARING OFFICER MEZA: Okay. All right. So under Bennett Industries, 313 NLRB 1363, since you're refusing to take a position regarding the packaging and shipping leads, you will not be able to present any evidence on this issue. However, the parties have already agreed that they will not present any additional evidence or witnesses in this case and that the Regional Director will rely on the record in case 21-RC-133636.

Okay. Mr. Adlong, does this accurately reflect the issues that are in dispute? And please state the position of the Employer with respect to these issues.

MR. ADLONG: Okay. So with respect to issue one, we continue to take the position that specialty healthcare is not the proper standard for the reasons cited in our previous post-hearing brief. We assert that -- reassert that position in this matter. We believe that the proper unit is a wall-to-wall P and M unit, including leads, as specified in our post-hearing brief mentioned above. And while you talked about numbers, those are approximate and appear to be close. And with respect to issue two, the record's clear that Mr. Lim is not a supervisor. With respect to Mister -- with the alleged issue three, we don't believe --

HEARING OFFICER MEZA: Uh-huh.

MR. ADLONG: -- that there is any issue three at issue. The issue is related to packaging and shipping leads. That has already been decided in the previous petition and the decision and direction of election. The Regional Director determined that the leads are not supervisors and they must be included at the Fullerton facility. And she's already said that the petitioned for unit is inappropriate because it excludes the package and shipping leads. And we believe that position is final.

And then if the Union does not admit that they must be

included in any inappropriate unit, that then by definition this petition seeks a unit that's inappropriate on its face and should -- and by determined by the final decision of the RD in Board Exhibit 4 and that this requires dismissal of the petition.

HEARING OFFICER MEZA: Okay.

MR. ADLONG: And we continue to take the position basically that Ms. -- that the Union's, you know, like ultimate failure to come out and state what their position is and try to ride -- try to have it both ways should just require dismissal without any post-hearing briefs, and just right here now.

HEARING OFFICER MEZA: Okay. Okay. Mr. Cantore, does this accurately reflect the issues in dispute here today, and can you please state the position of the Petitioner with respect to these issues?

MR. CANTORE: I would like to confer with my client first.

HEARING OFFICER MEZA: Sure. Off the record.

(Off the record at 9:35 a.m.)

MR. CANTORE: As to position one, I do agree that that position -- that issue -- as to whether -- as to issue one, the Union does agree that that accurately states the issue. With respect to issue two, we don't agree that that accurately states the issue. Our position with respect to Mr. Lim is first that he should be excluded not because he's a supervisor but because he is a quality control employee, and, therefore,

should be excluded under issue number one.

Getting down to issue number three, we take somewhat umbrage at the suggestion that the Union has not stated its position on the supervisory status of the leads. That would be the packaging, shipping and quality control leads. We have consistently taken the position in the prior case and then this case that they are statutory supervisors. We have not changed that position. However, we appreciate that the Regional Director in the earlier case held that we failed to establish that in the earlier hearing.

That said, if they are employees and the Regional Director holds in this case that they are employees, then they're included in the petitioned for unit. On the other hand, if the Regional Director in this case says we're stuck with her earlier decision or that even if we're not stuck with her earlier decision, based on the record of this case, they are supervisory employees, then they're excluded. I don't know how that somehow interferes with some right of the Employer but their objection is definitely interfering with the Section 7 rights of their employees. That's the position of the Union on that issue.

HEARING OFFICER MEZA: Okay. Okay. All right. And I now propose to receive Board Exhibit 3 and 4. Board Exhibit 3 is an agreement between the parties that they will not present any --

MR. ADLONG: I was just going to --

HEARING OFFICER MEZA: Oh --

MR. ADLONG: Sylvia --

HEARING OFFICER MEZA: -- sorry.

MR. ADLONG: -- if I --

HEARING OFFICER MEZA: Yes.

MR. ADLONG: Excuse me, Madam Hearing Officer, if I may?

HEARING OFFICER MEZA: Yes.

MR. ADLONG: Just with respect to the Bennett Industries, case, I mean the Employer would even go so far as to take the position to the extent that they continue to not take a position and not state whether or not these leads should or should not be in the unit and whether or not they want to proceed with the unit and whether -- if these people are found to be 211s, that they shouldn't even be able to brief the issue and that they shouldn't even be able to argue any sorts of merits at all regarding what the Regional Director has previously found in the previous petition. Like this should be said and done, they've had their piece, they've made a decision and they've made bed and now they need to sleep in it.

HEARING OFFICER MEZA: Okay.

MR. ADLONG: And we maintain that it should just be done. I mean we're sticking with our position and they need to, like we say, come out the closet and state firmly whether or not they expect leads -- whether leads should be included in that

petition and whether they proceed in a unit that includes leads.

HEARING OFFICER MEZA: Okay. All right. Okay. I now propose to receive Board Exhibit 3 and 4. Board Exhibit 3 is an agreement between the parties that they will not present any additional witnesses or evidence at this proceeding, and Board Exhibit 4 is a copy of the decision and in order to case number 21-RC-133636. The exhibits have already been shown to all parties. Are there any objections?

MR. CANTORE: No objections.

HEARING OFFICER MEZA: Hearing no objections, Board Exhibit 3 and Board Exhibit 4 are received into evidence.

(Board Exhibit Number 3 and 4 Received into Evidence)

HEARING OFFICER MEZA: Okay. This record, including the parties' stipulations and the parties' agreements on brief as well as the Regional Director's prior decision and order in case 21-RC-133636, will be relied upon by the Regional Director in making her decision in this case.

Could the Employer please state for the record the total number of employees in the petitioned for unit? Starting with the packaging employees and the shipping employees and then the receiving employees.

MR. ADLONG: Let's go off the record.

HEARING OFFICER MEZA: Sure. Off the record.

(Off the record at 9:40 a.m.)

HEARING OFFICER MEZA: All right. On the record.

Okay. Off the record we were discussing whether -- what the Union's position is with respect to Steve Lim and whether the Union contends that he is a section -- a 211 supervisor under -- a supervisor under Section 211 of the Act. And I just wanted to ask the Union again just to clarify for the record what its position is with respect to his status.

MR. CANTORE: The position is -- and I possibly misstated it -- is that first he should be excluded as a quality control employee because he's not within the petitioned for unit; he's within the exclusions, whether or not or he's a supervisor. However, we also take the position that if the Regional Director includes quality control in the petitioned for unit, then he should be excluded as a supervisor; that he is a statutory supervisor within the meaning of the Act.

And, finally, if the Regional Director rules against us and holds that quality control employees must be included in the petitioned for unit and that Lim is not a statutory supervisor within the meaning of the Act, then he would be included in the unit.

HEARING OFFICER MEZA: Okay. Okay. But just to clarify for the record, your position is that Steve Lim is a supervisor under Section 211 of the Act?

MR. CANTORE: That is correct.

HEARING OFFICER MEZA: Okay. All right. And now we're

going to just go ahead and -- and go back and complete the record. And the question that was pending prior to going off the record was I asked if the Employer could please state for the record the total number of employees in the petitioned for unit, and the Employer went ahead and just was able to obtain the -- or I guess an estimate as to the number of the employees in the petitioned for unit.

And so now can the Employer please state for the record the total number of employees in the petitioned for unit? Starting with the packaging employees and then --

MR. ADLONG: So --

HEARING OFFICER MEZA: -- shipping employees and then the receiving employees.

MR. ADLONG: We have approximately 23 packaging, approximately nine shipping, approximately three receiving, approximately four in maintenance, approximately four in quality --

HEARING OFFICER MEZA: Well, actually, we'll get to those.

MR. ADLONG: Okay.

HEARING OFFICER MEZA: We'll get to those later on.

MR. ADLONG: Fair enough.

HEARING OFFICER MEZA: Okay. So could the Employer please state for the record the total number of employees in the unit that the Employer asserts is appropriate for the purposes of collective bargaining?

MR. ADLONG: The wall-to-wall unit --

HEARING OFFICER MEZA: Uh-huh.

MR. ADLONG: -- right now is approximately -- about 53, by our count.

HEARING OFFICER MEZA: Okay. And could the Employer please state for the record the total number of employees in each disputed category? First, the maintenance employees?

MR. ADLONG: Four.

HEARING OFFICER MEZA: Quality control employees?

MR. ADLONG: Four.

HEARING OFFICER MEZA: The terminal employees?

MR. ADLONG: Eight.

HEARING OFFICER MEZA: Packaging leads?

MR. ADLONG: One.

HEARING OFFICER MEZA: Shipping leads?

MR. ADLONG: And then I have about two production leads.

HEARING OFFICER MEZA: The shipping leads?

MR. ADLONG: I don't have it -- right now, I don't know.

HEARING OFFICER MEZA: Production is the same as --

MR. ADLONG: Okay.

HEARING OFFICER MEZA: -- as packaging.

MR. ADLONG: Not by my understanding. Then -- I mean we have about three leads in dispute.

HEARING OFFICER MEZA: Okay. So there's just a total of about three leads? Okay.

MR. ADLONG: Approximately, yes.

HEARING OFFICER MEZA: All right. And that would include packaging and shipping leads, correct?

MR. ADLONG: As I understand it --

HEARING OFFICER MEZA: Okay.

MR. ADLONG: -- that is correct.

HEARING OFFICER MEZA: All right. And does the Petitioner wish to proceed to an election in an alternate unit if the unit sought by the Petitioner is deemed to be inappropriate?

MR. CANTORE: Yes.

HEARING OFFICER MEZA: Okay. Is there anything further that the parties desire to present?

Mr. Adlong, on behalf of the Employer?

MR. ADLONG: Yeah. I mean we maintain that if -- basically what the UFCW's done here is taken a position that they didn't want to proceed in a unit with leads. And now that they -- now that they've lost that, that they just come back and refile a petition, that is wholly inappropriate, that it should have been dismissed with prejudice and we shouldn't be able to re-litigate these issues that have already been decided.

And we just continue to maintain that the -- this has been decided, the ruling's final and it should be at least six months before they're able to bring this petition. That they shouldn't be able to correct a mistake that either they or their attorney made at the hearing to try to just somehow, "All

right. We didn't get what we want. We're not going to file a request for review and now we're now we're just going to bring a petition." It's wholly inappropriate, inappropriate use of the NLRB resources, inappropriate use of the procedures and the Region should dismiss the petition.

HEARING OFFICER MEZA: Okay. Mr. Cantore, on behalf of the Petitioner?

MR. CANTORE: Oh, nothing. I mean we'll --

HEARING OFFICER MEZA: Okay.

MR. CANTORE: -- state it in the brief. But just briefly on that one, I still don't understand how a piece -- person's Section 7 rights could be denied, even for six months, because the Union or it's counsel may have screwed up at the last hearing. I'm not conceding that they did, but they may have. Again, you go forward with the petition. Whether -- we are now stuck with the Board's ruling, of a Region's ruling, on the supervisory status of the four employees, this is a different unit we're petitioning for and we've also expressed an interest in going forward even if the Board still disagrees with us.

HEARING OFFICER MEZA: Okay.

MR. CANTORE: Or the Region still disagrees with us, rather.

HEARING OFFICER MEZA: Okay. Do the parties wish to waive the filing of briefs?

MR. ADLONG: I just wanted to say one more thing.

HEARING OFFICER MEZA: Sure.

MR. ADLONG: That it's like -- it borders on the absurd to suggest that this is a different unit. That this exact same thing -- we're re-litigating the exact same thing. And the decision's been final. And just reemphasize that --

HEARING OFFICER MEZA: Okay.

MR. ADLONG: -- these leads -- the decision's been made, the Union should have to live with the decisions they've made and -- and this -- essentially we have the law of the case. There's no reason to come back and ask the Regional Director for a redo. And the Employer will not waive the filing of briefs.

HEARING OFFICER MEZA: Okay. And the Petitioner, do you wish to waive the filing of briefs?

MR. CANTORE: Well, if the Employer's filing a brief, the Petitioner is going to file a brief.

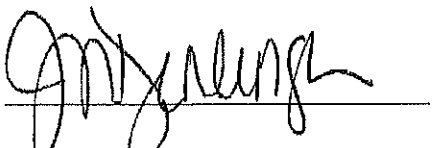
HEARING OFFICER MEZA: Okay. The briefs will be due on October 9th, 2014. And have all the -- the exhibits been offered and received? This is a question to the court reporter. Yes?

Okay. And if there is nothing further, the hearing will be closed. Hearing no response, the hearing is now closed. Thank you. Off the record.

(Whereupon, the hearing in the above-entitled matter was closed at 10:03 a.m.)

CERTIFICATION

This is to certify that the attached proceedings before the National Labor Relations Board (NLRB), Region 21, Case Number 21-RC-136849, Cargill Inc., and United Food & Commercial Workers Union, Local NO. 324, at the National Labor Relations Board, Region 21, 888 South Figueroa Street, Ninth Floor, Los Angeles, California 90017, on Thursday, October 2, 2014, at 9:21 a.m. was held according to the record, and that this is the original, complete, and true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing.



JACQUELINE DENLINGER

Official Reporter

Exhibit 10

ROBERT A. CANTORE (California Bar No. 127462)
TRAVIS S. WEST (California Bar No. 293920)
GILBERT & SACKMAN
A LAW CORPORATION
3699 Wilshire Boulevard, Suite 1200
Los Angeles, California 90010-2732
Telephone: (323) 938-3000
Fax: (323) 937-9139

Attorneys for Petitioner

UNITED STATES OF AMERICA
Before the
NATIONAL LABOR RELATIONS BOARD

In the Matter of: CARGILL, INC., Respondent/Employer, and UNITED FOOD AND COMMERCIAL WORKERS, LOCAL NO. 324, Petitioner/Union.	Case No. 21-RC-136849 PETITIONERS' POST-HEARING BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

This Post-Hearing Brief is filed on behalf of petitioner, United Food and Commercial Workers, Local No. 324 ("Union"), in support of its instant petition for an election in the following bargaining unit:

> Included: All full-time and regular part-time packaging, shipping, and receiving employees employed by the Employer at its facility located at 566 North Gilbert Street, Fullerton, California.
>
> Excluded: All other employees, maintenance employees, terminal employees, quality-control employees, staffing agency employees, office clerical employees, guards and supervisors as defined in the Act.

As the Region is well aware, this is not the first petition for an election filed by the Union with respect to this facility. In Case No. 21-RC-133636, the Union petitioned for a virtually identical unit with one major exception: the Union sought to ***specifically exclude*** "leads" as "supervisors" as defined in section 2(11) of the National Labor Relations Act ("Act"), 29 U.S.C. § 152(11). In that case, the Regional Director held that the Union had failed to meet its burden of proving that the leads were statutory supervisors and, because the Union at that time had refused to proceed to an election in any other unit, dismissed the petition.

In spite of its blustering rhetoric, respondent Cargill, Inc. ("Employer") opposes the current petition on several grounds. First, but hardly foremost, the Employer virtually concedes that, under *Specialty Healthcare & Rehab. Ctr. of Mobile ("Specialty*

Healthcare"), 357 NLRB No. 83 (Aug. 26, 2011); *accord Macy's & Local 1445, United Food & Commercial Workers Union ("Macy's"),* 361 NLRB No. 4 (July 22, 2014), the petitioned-for unit is indeed appropriate and that the employees in the maintenance, terminal and quality-control departments do not enjoy an overwhelming community of interest with the proposed unit and instead argues that the Regional Director should not follow *Specialty Heathcare.* It is easy to see why this is not the Employer's primary argument.

Instead, the Employer primarily contends that the three leads in the packaging, shipping and receiving departments (Jaime Sedano, Rafael Rodriguez and Ray Ramirez) and the one lead in the quality control department (Steve Lim) are not statutory supervisors. Because the Union will not agree with this contention (and instead maintains its contention that they are "supervisors" as defined in section 2(11) of the Act) *and* because the Regional Director has held that the Union did not meet its burden of proving that any of the four are supervisors in Case No. 21-RC-133636, the petition should be dismissed. In a reasoned opinion, the Regional Director already has denied the Employer's motion to dismiss the petition with prejudice. Board Exhibit 1(k). From the Region's apparent perspective, the only issue is whether or not the leads are statutory supervisors. *Id.; see also* Transcript of Proceedings Held on October 2, 2014 ("Tr 2") at 10.

As the Union will now show, the petitioned-for unit is appropriate. The Union also will show that the Employer's position that employees should be denied their basic section 7 right to "join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing" simply because the Union has changed its mind as to

whether or not it would be willing to proceed to an election if leads are included. And finally, the Union will show that the Regional Director need not reach the issue of the supervisory status of the leads at this stage of the proceeding.

II. ARGUMENT

A. The Union's Proposed Bargaining Unit is An Appropriate Unit.

In spite of the Employer's wishes to the contrary, the Board has clearly set forth the standard for determining whether the smallest appropriate unit must include additional employees beyond those included in the Union's petition in *Specialty Healthcare.* As the Board held,

> [W]hen employees or a labor organization petition for an election in a unit of employees who are *readily identifiable* as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that *the employees in the group share a community of interest* after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an ***overwhelming*** *community of interest* with those in the petitioned-for unit.

Specialty Healthcare, 357 NLRB No. 83, slip op. at 17 (emphasis added); accord *Macy's,* 361 NLRB No. 4, slip op. at 9.

Thus the burden initially rests with the Union, which must show that the group of employees listed in the petition constitute "an appropriate unit." *Id.* Once this is established, the burden then shifts to the Employer, which can defeat the Union's petitioned-for unit only by showing that employees not included in the petition share "an *overwhelming* community

of interest" with the employees in the Union's proposed bargaining unit. *Id.* (emphasis added).

1. The Employees Included in the Union's Petition Constitute an Appropriate Unit Because They Are Readily Identifiable as a Group and Share a Community of Interest.

It is clear that the employees included in the petitioned-for unit are "readily identifiable as a group" based on the standard set forth by the Board in *Specialty Healthcare* and just recently affirmed in *Macy's*. In *Macy's,* a sister local of the Union sought an election in a unit of "beauty advisors, counter managers, and on-call employees," which constituted all "nonsupervisory classifications in the cosmetics and fragrances department" of a large Macy's department store. *Macy's,* 361 NLRB slip op. at 10. While these employees constituted only a small fraction of the sales employees in the store, the Board nevertheless found these employees to be "readily identifiable as a group." *Id.* The Board reasoned that since they were all in one of three classifications in the same department, and all "perform the function of selling cosmetics and fragrances," they were "readily identifiable based on classification and function." *Macy's,* 361 NLRB slip op. at 10; *accord Specialty Healthcare,* 573 NLRB slip op. at 18 (Board found employees to be readily "identifiable as a group" because they constituted all of the employees in the "Nursing Department," that were within the "Certified Nursing Assistants" classification). The Board further noted that a set of employees may not be "readily identifiable as a group" if those employees are merely "an arbitrary segment" of a department or classification. *Id.*

Here, the Union seeks a bargaining unit comprised of all employees in all nonsupervisory classifications in the packaging, shipping and receiving departments. As in *Macy's,* the Union's petition tracks clear departmental lines established by the Employer. *See, e.g.,* Employer Ex. 2 at column 6 (marked "Department").[1] Likewise, just as in *Macy's,* the Union seeks to include all eligible employees within the specified departments. Notably, the Union does not seek any "arbitrary segment[s]" of employees within these departments, or within any of the eligible classifications, but includes *all* employees within its broadly defined parameters. *Specialty Healthcare,* 573 NLRB slip op. at 18. Furthermore, as in *Macy's,* these employees are clearly identifiable based on function. As discussed at length below, all of these employees share a common role in packaging and shipping the various products sold by the company, after such products have been processed and mixed elsewhere in the facility. Thus, just as in *Macy's,* the employees included in the Union's proposed unit are readily identifiable based on department, classification and function.

Moreover, the employees included in the Union's petition are even more clearly identifiable as a group than the employees in Macy's because there are physically separated from, and rarely interact with, the other potentially eligible employees working at the plant. Transcript of Proceedings Held on August 12, 2014 in Case No. 133636 ("Tr. 1") 188:24-198:3. That is, the employees sought by the Union constitute all of the eligible statutory employees working in a single building, which is separated from all other eligible statutory employees working at the plant not only by department and function, but also by

---

[1] Unless otherwise noted, all references to "Ex." are to exhibits offered at the hearing in Case No. 21-RC-133636.

four walls, a road, three railroad tracks and frequently rows of railway cars. Employer's Ex. 1. This, in conjunction with the factors discussed in *Macy's* and listed above, make it clear that the employees sought in the Union's petition are "readily identifiable as a group," based on department, job classification, function and physical location.

Finally, and unlike in its earlier petition, the Union does **NOT** seek to *specifically* exclude leads (arguably one of *many* classifications of employees – from forklift operator to filler operator and "depalitizer" – within two of the three petitioned-for departments and three of the six total departments) from the unit and has repeatedly expressed its willingness to proceed to an election if they ultimately are determined to be "employees" as defined in section 2(3) of the Act and entitled to vote. Put simply, when asked by the Region *in this case* for a position on their status, the Union merely has taken to position that they are "supervisors" as defined in section 2(11) of the Act. Although it is true that the petition does seek to specifically exclude "supervisors as defined in the Act" from the unit, on its face the petition does not seek to specifically include or exclude any specific classification of "employee" working in the three departments, lead or otherwise. Rather, it is broad enough on its face to include leads (and forklift operators, filler operators, "depalitizers," etc.) ***if*** they are employees as defined in section 2(3). *See Specialty Healthcare,* 573 NLRB slip op. at 18.

The employees in the petition also clearly share a "community of interest" as established by *Specialty Healthcare* and *Macy's*. The Board in both cases reiterated the following well recognized principles for determining whether employees share a community of interest:

> [W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Specialty Healthcare, 357 NLRB slip op. at 14 (*citing United Operations, Inc.*, 338 NLRB 123, 123 (2002)); *Macy's,* 361 NLRB slip op. at 10; *accord, Bartlett Collins Co.*, 334 NLRB 484, 484 (2001) ("In determining whether the employees possess a separate community of interest, the Board examines such factors as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration.").

As discussed earlier in this section, it is undisputed that the three groups of employees included in the Union's petition as amended are organized into three departments, and that these departments are grouped together in a building that is physically separated from all other departments at the plant. As a result of this physical proximity, employees in these three departments interact with each other on a daily basis, both while working and while on break. Tr. 188:24-189:3. These employees all know each other personally (Tr. 1 188:24-189:3), all take lunch together in one of two break rooms within their building (Tr.1 260:24-262:1), and all park in the same general areas (Tr. 1 141-144; 262:2-3). Likewise these employees all collectively work towards a single function of packaging and shipping the company's product. The degree to which these three departments are functionally integrated is demonstrated by the fact that many of the employees in these departments are trained to, and

occasionally do, work in classifications and departments other than their own as need requires. Tr. 1 77-79. Indeed, employees may even be transferred to other departments within the building without any notice based on demand. Tr. 1 243:19-244:6. The operation of these three departments is so intertwined that employees refer to them collectively as "packaging." Tr. 1 215:21-216:6.

This integration of the three departments is mirrored within each department. In packaging, there is a specific classification called "Reliever," who are "able to relieve any area on the line" and can therefore operate the forklift, work as the filler operator, and "depalitize" crates. Tr. 1 70:8-11. Likewise, Supervisor Stephanie Puig ("Puig") testified repeatedly that nearly every employee within each of these departments can work in several different job classifications within packaging, shipping, and receiving. Tr. 1 77-79. Moreover, all of these employees share the same benefits package, and are all compensated at roughly the same rate. Tr. 1 163:1-25. 260:15-19. Finally, all of these employees are currently supervised by Puig, and until recently were all supervised by Gil Alvarado, and thus share a long history of common supervision. Tr. 1 114:17-115:6. In sum, all of the factors identified by the Board in *Specialty Healthcare* and *Macy's* clearly indicate that these employees share a community of interest.

Therefore, as in *Macy's,* because the employees included in the Union's petition "share a community of interest" and are "readily identifiable as a group" the Board must "find the petitioned-for unit to be an appropriate unit" unless the Employer can show that the employee's in its desired unit "share an overwhelming community of interest with those in

the petitioned-for unit." *Macy's,* 361 NLRB slip op. at 10-11. As discussed below, this is simply not the case.

2. The Employees Included in the Union's Petition Do Not Share an Overwhelming Community of Interest with the Employees that Cargill Seeks to Include in the Bargaining Unit.

In both *Specialty Healthcare* and *Macy's*, the Board has made it clear "that two groups share an overwhelming community of interest when their community of interest factors overlap almost completely." *Macy's,* 361 NLRB slip op. at 9 (internal quotation omitted; emphasis added). In *Specialty Healthcare,* the Board clarified that "the proponent of the larger unit must demonstrate that employees in the more encompassing unit share 'an overwhelming community of interest' such that there is 'no legitimate basis upon which to exclude certain employees from it.'" *Specialty Healthcare,* 357 NLRB slip op. at 16 (*citing Blue Man Vegas, LCC v. NLRB,* 529 F.3d 417 (D.C. Cir. 2008).

Thus, in determining if the smallest appropriate unit includes employees not listed in the Union's petition, the Board applies the traditional community of interest factors, but requires a "heightened showing" by the party opposing the petition, such that it must prove that there is "no rational basis" by which to distinguish the employees in the Union's proposed unit from those in the one sought by the Employer. *Specialty Healthcare,* 357 NLRB slip op. at 17. Clearly this is an extremely difficult standard to meet. Indeed, Board Member Brian E. Hayes, in his dissenting opinion in *Specialty Healthcare,* recognized that under this standard it is "virtually impossible for a party opposing [the petitioned-for unit] to prove that any excluded employees should be included." *Id.* at 29. However, in spite of this

"shortcoming" perceived by Member Hayes, the standard established in *Specialty Healthcare* has been affirmed in several subsequent Board cases, and must be applied in the case at bar. *See Macy's,* 361 NLRB slip op. at 10.

In *Macy's,* despite numerous similarities between the two groups of employees, the Board applied the community of interest factors and determined that the employer had not demonstrated an "overwhelming community of interest" between the employees in the petitioned-for unit and those the employer sought to include. The Board reached this conclusion despite the fact that the two groups of employees "work shifts during the same store hours, are subject to the same handbook, are evaluated on the same criteria, are subject to the same dispute-resolution procedures, receive the same benefits, use the same entrance and break room, attend brief morning rallies [on a daily basis]. . . . and use the same clocking system." *Macy's,* 361 NLRB slip op. at 15. The Board further noted that there was some regular "contact between cosmetics and fragrances employees and other selling employees." Specifically, employees in the fragrances and cosmetics department interacted with other sales employees to the extent that "from time to time merchandise from other sales departments [was] rung up in cosmetics and fragrances," that "selling employees [were] expected to help each other out and to assist customers," and that "cosmetics and fragrances personnel recruit[ed] customers in other areas of the store." *Id.* at 5. This interaction was facilitated by "the proximity of the cosmetics and fragrances counters to other departments," and the fact that these departments were not physically separated. *Id.*

The Board nevertheless found this to be insufficient to support a finding of an "overwhelming community of interest" and invalidate the union's proposed unit. *Macy's,* 361 NLRB slip op. at 12. The Board reasoned that the contact between the cosmetics and fragrances employees and other sales employees was merely "incidental," and therefore insufficient to "support a finding of regular, significant contact between the petitioned-for employees and other selling employees" necessary to support an "overwhelming community of interest." *Id.* Similarly, the Board established that there was no "functional integration" because of this "limited interaction between the petitioned-for employees and those that the employer seeks to add." *Id.* at 12-13. The Board noted that the other similarities were outweighed by the facts that "the employees work in a separate department from all other sales employees and that the petitioned-for unit consists of all nonsupervisory employees in that department," that "the petitioned for employees are separately supervised," that there was no "significant interchange between the petitioned-for employees and other selling employees," and that the employees "work in separate physical spaces." *Id.* Therefore the Board determined that the employer had failed to establish that the community of interest factors "overlap almost completely," and therefore concluded that the employer had fallen well short of establishing the "overwhelming community of interest" necessary to invalidate the union's proposed unit. *Id.*

While the Employer has made a great deal of the petitioned-for employees interaction with other employees not sought in the petition at the hearing, the evidence clearly demonstrates that, as in *Macy's,* this contact was merely "incidental," and far from sufficient

to support a finding of an "overwhelming community of interest." *Id.* The contact that employees in the packaging, shipping, and receiving departments have with employees from other departments amounts to nothing more than taking samples to the lab, turning a nozzle to activate the votator, Lead Steve Lim escorting a Rabbi through the building and occasionally picking up "paperwork" from packaging, picking-up and dropping off misplaced packages, and maintenance conducting repairs on machines. With respect to taking samples to and from the lab, samples taken from packaging are typically taken over by the lead. Tr. 1 120:12-17. While other packaging employees occasionally take over samples, and votator operators typically take samples over themselves, this process is relatively brief, and involves simply filling out some paperwork and dropping off a pre-labeled sample at the lab. Tr. 1 120:2-5; 121:16-20. There may not be any communication with lab employees required at all. Tr. 1 120:7-11.

Similarly, activating the votator requires nothing more than activating a valve, and can be accomplished in a matter of moments without any interaction with any employees in other departments. Tr. 1 119:14-25. Likewise, Steve Lim only escorts the Rabbi through the plant once every two weeks and only picks up "paperwork" from packaging once per week. Tr. 1 159:15. Employees in the packaging, shipping and receiving departments infrequently, if ever, interact with Lim during these visits. Tr. 1 188:1-25. Picking up misplaced packages from the other side also necessitates little if any interaction with employees from other departments, and only occurs occasionally, due to the fact that the delivery companies used by the Employer occasionally disobey the Employer's instructions on where to deliver

packages. Tr. 1 138:1-140:25. Finally, while maintenance is usually required on one of the machines in the packaging, shipping or receiving departments about three times per week, employees only interact with maintenance employees, if at all, to the extent necessary to facilitate repairs. Tr. 1 235:1-25.

Many employees in the packaging, shipping, and receiving departments only go over to the other departments once per month or less, and only in unique circumstances. Tr. 1 257:1-25; 233:6-234:4. Likewise, these employees also testified that they very rarely see any employees from other departments in their area. Tr. 1 225:1-227:25; 188:1-25; 256:1-25; 226:11-227:6. In sum, here, as was the case in *Macy's,* while there is *some* contact with other departments not included in the petition-for unit, this limited interaction is merely "incidental," and therefore insufficient to support an "overwhelming community of interest."

Moreover, as mentioned above and unlike in *Macy's,* the employees sought in the Union's petition are physically separated from other employees at the plant, as they are housed in a separate building separated by railroad tracks. These groups of employees enter through different entrances (Tr. 1 141:1-144:25), use different break rooms (Tr. 1 260:24-262:1), and generally do not even know each other's names (Tr. 1 188:24-198:3). Therefore, unlike in *Macy's,* these employees rarely even see employees from other departments, let alone interact with them, while at work or on break. Likewise, until recently, packaging, shipping and receiving employees all reported to a separate supervisor, who did not supervise any employees in other departments. Tr. 1 114:17-115:6. Furthermore, there is limited interchange between employees in packaging, shipping and receiving and other

departments. That is, only three employees have been transferred from packaging, shipping and receiving to any of the departments on the other side of the railroad tracks, and two of these employees were likely working in one of these departments through a temporary employment agency. Tr. 1 126:25- 127:12.

Similarly, no employees have transferred *into* packaging, shipping and receiving from other departments in the last five years. Tr. 1 127:15-18. Thus, as in *Macy's,* the "incidental" interaction with other departments is outweighed by the facts that the petitioned for employees work in three "separate departments]" in a separate building, have a history of being "separately supervised," have no "significant interchange" with employees from other departments other than those included in the petition, and "work in separate physical spaces." *Macy's,* 361 NLRB slip op. at 12. Therefore, the community of interest factors between the petitioned-for employees and the other employees at the plant clearly do not "overlap almost completely" and thus the Employer cannot invalidate the Union's petition based on an "overwhelming community of interest." *Id.* As such, the Union's proposed bargaining unit must be deemed valid. *Id.*

And finally and as noted above, although the Employer urgently argues that the *Specialty Healthcare* standard is not the proper standard to apply, it is the standard that the Regional Director must apply. *See Macy's.*

B. Employees Should Not Be Denied Their Section 7 Rights Merely Because the Union Has Changed its Mind.

Although the Regional Director has far more than adequately addressed this issue in her decision denying the Employer's motion to dismiss the petition (Board Exhibit 1(k)), the Union cannot help but again note that section 7 of the Act guarantees the Employer's employees the right to "join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing." This is a right granted to *employees,* not to labor organizations, and should not be denied to them because of a rather inconsequential act of a labor organization *not* with respect to the employees, but with respect to their employer. It really is that simple.

C. The Regional Director Need Not Consider the Supervisory Status of Leads at this Stage of the Proceedings.

In the instant petition, the Union seeks a unit of approximately 35 employees counting the three leads in the packaging and shipping departments (Jaime Sedano, Rafael Rodriguez and Ray Ramirez). Employer Ex. 2. Thus, in the petitioned-for unit, the leads make up less than 10% (actually, 8.5%) of the arguably eligible voters. *Id.* If the Regional Director were to include the approximately 16 employees in the maintenance, terminal and quality control departments, the percentage (including Steve Lim) would drop to 7.8%. *Id.*

Under the Board's admittedly proposed elections, "[t]he parties could choose not to raise such issues at the pre-election hearing but rather via the challenge procedure during the

election. Litigation of eligibility issues raised by the parties involving less than 20 per cent of the bargaining unit would be deferred until after the election." http://www.nlrb.gov/news-outreach/fact-sheets/amendments-nlrb-election-rules-and-regulations-fact-sheet (emphasis added). While the proposed rules are not yet effective and there is no current rule directly on point, the Union's undersigned attorney (as of this very month) has practice before the NLRB for 40 years and can think of numerous instances where this Region and several other Regions have deferred issues regarding supervisory status until after the election, *especially* where (as here) the issue involves less than 10% of the bargaining unit.

Indeed, the *only* reason not to follow this procedure here is that, in connection with the earlier petition in Case No. 21-RC-133636, the Regional Director concluded that "The Petitioner did not meet its burden of establishing that the packaging and shipping leads are supervisors as defined in Section 2(11) of the Act. Therefore, the petitioned-for unit is inappropriate because it excludes the packaging and shipping leads." Decision and Order at 13. Thus, the issue becomes, should this conclusion bar the Union from seeking not to further delay the already delayed election (albeit mostly by its own hand) by choosing "not to raise such issue[] at the pre-election hearing but rather via the challenge procedure during the election"? For the reasons now explained, the answer is, no.

First, unlike in its earlier petition, the Union has not sought to specifically exclude (or include) leads in the petitioned-for unit. Unless for some reason the Regional Director specifically excludes them from the unit (which certainly would ***not*** be at the urging of the Union, which has merely stated its position on their status when asked), they will be entitled

to vote in any ordered election. *See, e.g.,* Case Handling Manual, § 11338.7. Because leads (as well as every other classification of employee) would not be specifically included in the unit, any party would be free to object to their ballots for whatever reason it can imagine, including supervisory status. *See id.*

Second, although it is true that the party *asserting* that individuals are supervisors under the Act bears the burden of proving their supervisory status (*Kentucky River Community Care, Inc.,* 532 U.S. 706 (2001); *Dean & Deluca New York, Inc.,* 338 NLRB 1046, 1047 (2003)), it is also true that it is most often the employer raising the issue and thus "[t]his conclusion is reinforced by the employer's natural advantage in adducing proof as to how it organizes its operations and personnel." *New York University Medical Center v. NLRB,* 156 F.3d 405 (2nd Cir. 1998). Here, the Union had a distinct disadvantage in adducing proof as to how the Employer organizes its operations and personnel and should not be further penalize for that disadvantage.

Third, this is not an unfair labor practice proceeding, where supervisory status could expose an employer to liability for conduct committed by the alleged supervisor, but a representation proceeding in which Congress clearly and unmistakably expressed its intention that supervisors not be counted among the employees entitled to vote. 29 U.S.C. § 152(3) (expressly excluding from the statutory definition of "employee" "any individual employed as a supervisor"). In a new *petition* (as opposed to in a new unfair labor practice proceeding), issues of fairness embodied in the *res judicata* doctrine simply do not come into play.

And finally, were it not for the fact that it would undoubtedly have dragged on the hearing for days, the Union would have subpoenaed the four leads to testify, delaying the election even more. *See* Decision and Order at 9 (noting that "None of the packaging and shipping leads were presented at the hearing to testify with respect to their day-to-day duties.")

It sum, what possible reason is there to decide the issue now, other than to provoke an election-delaying appeal by one of the parties (most likely the Union) when any decision can be temporarily evaded (and possibly even completely avoided) by waiting to see if their votes could effect the outcome of the election?

III. CONCLUSION

For all of the above reasons, the Union's petition should be granted without further amendment or delay and a self-determination election should be promptly ordered in the petitioned-for unit. Alternatively, the Regional Director should order an election in whatever unit she deems appropriate.

DATED: October 9, 2014

Respectfully submitted,

GILBERT & SACKMAN
A Law Corporation

By _____
Robert A. Cantore
Attorneys for Petitioner

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California; my business address is 3699 Wilshire Boulevard, Suite 1200, Los Angeles, California 90010.

I hereby certify that on October 9, 2014, I served a true and correct copy of the following document(s) described as **PETITIONERS' POST-HEARING BRIEF** on the following parties by electronic filing:

Olivia Garcia, Regional Director
National Labor Relations Board, Region 21
888 S. Figueroa Street, Floor 9
Los Angeles, California 90017-5449

I further certify that on October 9, 2014, I served true and correct copies of the above referenced **PETITIONERS' POST-HEARING BRIEF** on the following individuals by causing such documents to the transmitted via e-mail to the e-mail addresses set forth below:

Sylvia Meza
sylvia.meza@nlrb.gov

Douglas M. Topolski, Esq.
douglas.topolski@ogletreedeakins.com

By: _____
Attorneys for Petitioner

Exhibit 11

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 21-RC-136849

Cargill, Inc.

and

United Food &
Commercial Workers
International Union,
Local No. 324

POST-HEARING BRIEF OF CARGILL, INC.

Prepared by:

OGLETREE, DEAKINS, NASH,
SMOAK AND STEWART, P.C.

Douglas M. Topolski, Esquire
1909 K Street, Suite 1000
Washington, DC 20006
202.263.0242 (phone)
202.887.0866 (fax)

Ruth L. Goodboe, Esquire
34977 Woodward Avenue, Suite 300
Birmingham, Michigan 48009
248.723.6143 (phone)
248.593.2603 (fax)

Attorneys for Cargill, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

In the Matter of:

CARGILL, INC.,

Employer,

and **Case No. 21-RC-136849**

UNITED FOOD & COMMERCIAL WORKERS UNION LOCAL NO. 324,

Petitioner.

EMPLOYER'S POST HEARING BRIEF

Employer Cargill, Inc., (the "Employer"), through undersigned counsel, respectfully submits this post hearing brief. For the reasons discussed below, as well those previously brought to the attention of the Region both in this case and in Case No. 21-RC-133636, the Regional Director should dismiss this petition immediately with prejudice. Alternatively, the Regional Director should grant the Employer's Request for Special Permission to Appeal Ruling of the Regional Director Denying Employer's Motion to Dismiss the Petition with Prejudice. Alternatively, the Regional Director should decline to employ the test set out in *Specialty Healthcare and Rehabilitation Ctr. of Mobile*, 357 NLRB No. 83, 2011 NLRB LEXIS 489 (2011) and use the community of interest standard that has been accepted by the National Labor Relations Board ("the Board") for decades. Further, and again alternatively, and regardless of the standard used, the Regional Director should again reject the Union's proposed unit as not appropriate. The Regional Director should order an election only in a unit that includes all

packaging, shipping, receiving, maintenance, terminal, and quality or lab employees, and leads and Lab Tech 3 employees, and excludes office clerical employees, professional employees, staffing agency employees, guards, and supervisors as defined in the National Labor Relations Act ("the Act").

I. INTRODUCTION AND PROCEDURAL HISTORY

The Petitioner, United Food & Commercial Workers Union Local No. 324 (the "Union"), filed the petition in the above-captioned matter on September 16, 2014. In this case, the Petitioner seeks a unit of packaging, shipping, and receiving employees employed at the Employer's Fullerton, California facility. October 2, 2014 Tr. 5-7.[1] The Petitioner also maintains that lead employees in these and other classifications are supervisors. "We have consistently taken the position in the prior case and then in this case that they [lead employees] are statutory supervisors." *Id.* at 13. This exact unit has already been deemed inappropriate in a final decision from this Regional Director. "The Petitioner did not meet its burden of establishing that the packaging and shipping leads are supervisors as defined in Section 2(11) of the Act. Therefore, the petitioned for unit is inappropriate because it excludes the packaging and shipping leads." Exhibit 1, Case No. 21-RC-133636 September 11, 2014 Decision and Order ("D&O") at 13.

The Petitioner filed a Petition in Case No. 21-RC133636 seeking exactly the same unit it seeks in this matter. *See* Exhibit 1; Exhibit 2, Employer's Post Hearing Brief in Case No. 21-RC-133636 (hereinafter Employer's August 19, 2014 Brief); *see also* August 12, 2014 Tr. at 11. A hearing was conducted in Case No. 21-RC-133636 on August 12, 2014. The Petitioner took the

---

[1] The Transcript in this case shall be referred to as the October 2, 2014 Tr. The transcript in Case No. 21-RC-133636 shall be referred to as the August 12, 2014 Tr.

positon at that hearing that it would not proceed in any unit but the narrow one it had identified, which excluded lead employees. *E.g* Exhibit 1 at 13.

The record in Case No. 21-RC-133636, made a part of this matter, makes plain that the unit sought by the Union is not appropriate. The record establishes instead that the Fullerton facility is a single and fully integrated processing and packaging operation where all employees share an overwhelming community of interest. Thus, the only appropriate unit consists of the unit sought by the Employer.

The Regional Director did not find it necessary to rule on the broader unit issues in Case No. 21-RC-133636. Instead, the Regional Director's D&O dismissed the petition. The Regional Director correctly concluded that the Union failed to meet its burden of showing that the packaging and shipping leads were supervisors within the meaning of Section 2(11) of the Act. Since the Union stated on the record that it would only proceed in the unit it sought without the leads, the Regional Director concluded, again correctly, that the unit sought by the Petitioner was not appropriate. Exhibit 1 at 13-14. Thus, the only option was to dismiss the petition.

The Union did not file a request for review of the D&O. It did not ask for reconsideration or to reopen the record. Instead, the Union ignored the D&O completely. It filed the instant petition seeking the same unit the Regional Director found inappropriate in Case No. 21-RC-133636.

The Employer moved to dismiss this petition on September 24, 2014. The Regional Director incorrectly denied the Motion on September 26, 2014.

On October 1, 2014, the Employer filed a special request to appeal the denial of its Motion to Dismiss to the Board. It asked that the hearing in this matter be cancelled while the appeal was pending. This request remains pending.

Notwithstanding the Employer's request that it be cancelled, the hearing in this matter was conducted on October 2, 2104. No new evidence was taken. In this case, and contrary to the position it took in Case No. 21-RC-133636, the Union suggested that it would proceed to an election in a unit other than the only one it demanded in Case No. 21-RC-133636. October 2, 2014 Tr. 19. Significantly, the Union still insists that the leads are supervisors. *Id.* at 13 and 16. This Brief follows.

II. ARGUMENT

A. The Petition Should Be Dismissed With Prejudice

The record in this case makes clear that the petition should be dismissed with prejudice. The petition seeks exactly the same unit that was found inappropriate in Case No. 21-RC-133636. Thus, this matter never should have proceeded to a hearing. It should have been dismissed when it was filed and it certainly should be dismissed now. *See* Exhibit 3, Employer's Motion to Dismiss at 6-7 and authorities cited therein.

It does not matter that the Union suggests at this late time that it might be willing to proceed in a unit other than the narrow one it seeks. The Union was provided the opportunity to take exactly this position in Case No. 21-RC-133636. It was given a recess during the August 12, 2014 hearing for the express purpose of evaluating in what unit or units it wanted to proceed. *See* Exhibit 3 at 4. It chose to waive raising the very issues it seeks to have resolved here when it adhered to its position that it would only proceed in a unit of packaging, shipping, and receiving employees without leads. This unit was found inappropriate and the petition was dismissed. The Union did not request review of the D&O so its conclusions are final. Filing a new petition does not change the fact that the unit the Union seeks is not appropriate on its face. The Union cannot

litigate here exactly the issues that it was invited but declined to raise in Case No. 21-RC-133636. *See generally* Exhibit 3.

The record in this matter demonstrates beyond any debate that this petition represents nothing more than a transparent effort by the Union to circumvent the Board's review process in an improper effort to reverse the consequences of the Union's miscalculation in Case No. 21-RC-133636. Indeed, the Union virtually admitted as much on the record. *See* October 2, 2014 Tr. at 20.[2] The Board either has Rules and Regulations and litigation parameters to which it will require parties to adhere or it does not. The Board's Rules and Regulations, the *Casehandling Manual*, and its decisions all prohibit duplicative and repetitive litigation of issues that could have and should have been litigated in previous proceedings. The Union should be required to abide by these standards.

The Board's principles also provide for penalties when a petitioner seeks to end representation cases short of an election after a hearing has been conducted. That penalty is dismissal with prejudice. *See* Exhibit 3 at 7 and authorities stated therein. Thus, the petition in this case should be dismissed with six months' prejudice to seeking the same or similar unit at the Employer's Fullerton, California facility.

---

[2] It is no answer to suggest as the Union does that the Regional Director should not dismiss the petition because an election would be delayed. October 2, 2014 Tr. at 20. There are many Board procedural mechanisms that can result in delayed elections. Indeed, and for example, if the Union filed a blocking charge in this case, even an unsuccessful charge could delay a vote for many months or even years without any recourse to the employer or the affected employees. This does not mean that the Board would compromise the procedures the Union set in motion. The Union's choices here should produce the same result. The Union should be required to bear the consequences for the strategic litigation decisions it makes. The Union should not be allowed to demand a "do over" in contravention of established procedures merely because it does not like the results its decisions produced in a previous matter.

B. If The Petition Is Not Dismissed, The Employer's Request For A Special Appeal From The Order Denying Its Motion To Dismiss Should Be Granted

If The Regional Director will not dismiss the petition, then the Employer's Request for Special Permission to Appeal Ruling of the Regional Director Denying Employer's Motion to Dismiss the Petition with Prejudice should be granted. No less than the integrity of the Board's Rules and procedures as well as the Employer's due process rights are at issue. Parties have the right to expect that all of them will be held to the same rules and standards of procedure. If the Employer does not prevail on its positions in this matter, it will have no recourse but to accept the Regional Director's decision or request review of that decision in the manner prescribed by the Board's Rules and Regulations. It is ludicrous to suggest that the Union could again ignore a decision adverse to its desires by circumventing the very procedures applicable to the Employer in favor of filing a third petition. The Regional Director should therefore grant the Employer's request for special permission to appeal, hold further proceedings in this matter in abeyance, and provide the Board with the opportunity to protect the necessity of consistent application of its Rules and Regulations and to provide crucial guidance as to these most important matters.

C. Alternatively, The Regional Director Should Direct An Election Only In The Integrated Unit Sought By The Employer

In the event the Regional Director decides to proceed with this matter, the Union's proposed unit should be found inappropriate. For the reasons brought to the attention of the Region in Case No. 21-RC-133636 and set out in Employer's August, 19, 2014 Brief at 12-15, the Regional Director should not use the standard set out in *Specialty Healthcare, supra.* Moreover, and regardless of the standard used, the Regional Director should order an election only in the fully integrated production and maintenance unit that includes all packaging,

shipping, receiving, terminal, quality control, maintenance, and lead employees and the Lab Tech 3. *Id.* at 15-25.

III. CONCLUSION

Consistent with the Board authority cited above, the record evidence from the hearing, and the briefs and arguments brought to the attention of the Regional Director previously in this case and in Case No. 21-RC-133636, the Regional Director should dismiss the pending petition with prejudice. Alternatively, the Regional Director should grant the Employer's Request for Special Permission to Appeal Ruling of the Regional Director Denying Employer's Motion to Dismiss the Petition with Prejudice and stay further proceedings until that Appeal is resolved. Alternatively, the Regional Director should decide that the smallest appropriate unit for the purposes of the present petition is all full-time and regular part-time maintenance, terminal, shipping, receiving, packaging, and quality employees, including the production leads, packaging lead, and Lab Tech 3.

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, LLC

DATED: October 9, 2014

By: /s/

Douglas M. Topolski, Esquire
1909 K Street, Suite 1000
Washington, DC 20006
202.263.0242 (phone)
202.887.0866 (fax)

Ruth L. Goodboe, Esquire
34977 Woodward Avenue, Suite 300
Birmingham, Michigan 48009
248.723.6143 (phone)
248.593.2603 (fax)

Attorneys for Cargill, Inc.

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the within Post-Hearing Brief of Cargill, Inc. has been served by electronically filing same this 9th day of October, 2014 on:

Olivia Garcia, Regional Director
National Labor Relations Board, Region 21
888 S. Figueroa Street, Floor 9
Los Angeles, CA 90017-5449

Also, I do hereby certify that a true and correct copy of the within Post-Hearing Brief of Cargill, Inc. has been served on the following individuals by e-mail this 9th day of October, 2014: Sylvia Meza at sylvia.meza@nlrb.gov, Robert A. Cantore, Esq. at rac@gslaw.org, and Travis S. West, Esq. at twest@gslaw.org.

By: /s/
Counsel for Cargill, Inc.

EXHIBIT 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

RECEIVED
SEP 15 2014
By

CARGILL, INC.[1]

Employer

and

UNITED FOOD & COMMERCIAL WORKERS UNION LOCAL NO. 324[2]

Petitioner

Case 21-RC-133636

DECISION AND ORDER

United Food & Commercial Workers Union Local No. 324 (Petitioner) filed the instant petition on July 28, 2014, seeking to represent all full-time and regular part-time packaging, shipping, and receiving employees employed by the Employer at its facility located at 566 North Gilbert Street, Fullerton, California for collective-bargaining purposes; excluding all other employees, packaging leads, shipping leads, office clerical employees, professional employees, staffing agency employees, guards and supervisors as defined in the National Labor Relations Act.[3]

The Employer contends that the petitioned-for unit is not an appropriate unit because it does not include the maintenance, terminal, and quality-control employees, who share a

[1] The Employer's name appears as amended at the hearing.
[2] The Petitioner's name appears as amended at the hearing.
[3] The Petitioner amended the unit description at the hearing.

community of interest with the petitioned-for employees. In addition, the Employer contends that the packaging and shipping leads are not supervisors as defined in the Act, and should also be included in the unit.

On August 12, 2014, a hearing in this matter was held before a hearing officer of the National Labor Relations Board (the Board), and the parties thereafter filed briefs. Pursuant to the provisions of Section 3(b) of the National Labor Relations Act (the Act), the Board has delegated its authority in this proceeding to me.

I. THE ISSUES AND SUMMARY

The issues are:

1. Whether the packaging, shipping, and receiving employees share an overwhelming community of interest with the maintenance, terminal, and quality-control employees, so as to be included in a single unit for purposes of collective bargaining.
2. Whether the packaging leads (Jaime Sedano and Rafael Rodriguez), the shipping lead (Raymond Ramirez), and a quality-control employee (Steve Lim), are supervisors under the Act. The Petitioner contends that they are supervisors as defined by Section 2(11) of the Act. The Employer contends that they are employees as defined in the Act, and should be included in the unit.

Based on the record in its entirety, I find that the packaging and shipping leads are not supervisors as defined in the Act, and should be included in any appropriate unit. Thus, I find that the petitioned-for unit is not an appropriate unit because it excludes the packaging and shipping leads. At the hearing, the Petitioner stated that it does not wish to proceed to an

election in any alternate unit if the unit sought by the Petitioner is deemed to be inappropriate. Therefore, I hereby dismiss the petition.[4]

FACTUAL BACKGROUND

A. Overview of the Employer's Operation

The Employer is engaged in the business of operating an oil processing facility in Fullerton, California.[5] Oil arrives at the facility in bulk via railcars or trucks. It is then stored, tested in a lab at the facility, certain oils are blended, and oil ultimately get packaged and shipped to customers. A total of 51 employees (including 3 leads) work in the following departments: terminal, quality-control, maintenance, packaging, shipping, and receiving.[6]

Terminal employees unload the oil from railcars or trucks, and transfer it to the appropriate tanks. The quality-control department (also known as the lab) is in charge of testing the oil each time it gets moved within the facility and after it gets blended. This department has four lab technicians who perform the analysis to test the oil. Various employees, including terminal employees, leads, and certain packaging employees, drop off oil samples at the lab for testing. The maintenance department currently consists of four mechanics responsible for repairing equipment in the facility, including equipment used by machine operators in the packaging department.

---

[4] Since the Petitioner does not wish to proceed to an election in any alternate unit, it is not necessary to rule on the issues of: (1) whether the packaging, shipping, and receiving employees share an overwhelming community of interest with the maintenance, terminal, and quality-control employees; and (2) whether Steve Lin, a quality-control employee, is a supervisor as defined in the Act.

[5] The parties agreed to a commerce stipulation: the Employer, a Delaware corporation, with a facility located at Fullerton, California, is engaged in the business of operating an oil processing facility. During the past 12 months, a representative period, the Employer, purchased and received goods valued in excess of $50,000 which goods were shipped directly to the Employer's Fullerton, California facility from points located outside the State of California.

[6] Eight employees work in the terminal, 4 in quality-control, 4 in maintenance, 23 in packaging, 9 in shipping, and 3 in receiving.

Packaging-department employees perform various tasks. There, employees operate one of four lines: one where oil is packed into 35 lb. jugs in a cardboard boxes; one where it gets packed as a 50 lb. cube; one where oil gets packed into 5-quart bottles; and a so-called OLE line where oil get packed in different types of smaller bottles. Among the packaging employees, some work as relievers, votator operators, filler operators, or depalletizers. Relievers are responsible for filling in and relieving anyone in the lines, votator operators operate a particular machine that adjusts the viscosity of the oil, filler operators operate the machines in the line, and depalletizers remove boxes from pallets. Other packaging employees use forklifts to move the packaged oil to a warehouse area.

Thereafter, the oil gets shipped out by employees in the shipping department. Shipping employees either load trucks with finished product or perform clerical work related to shipping.

The receiving department handles the purchase and receipt of raw materials. The purchaser coordinates the purchase of raw materials while the other receiving employees operate forklifts to unload and store the material at the facility.

Stephanie Puig ("Puig") is the supervisor of the terminal, packaging, shipping, and receiving departments. In those departments, Puig is responsible for issuing any necessary discipline. She is also involved in hiring for those departments. Employees go to her to request time off, and she approves vacation requests. She is also responsible for conducting performance appraisals for those employees.

B. Packaging Leads Jaime Sedano and Rafael Rodriguez[7]

There are two leads in the packaging department; Jaime Sedano ("Sedano"), first-shift lead, and Rafael Rodriguez ("Rodriguez"), the second-shift lead. Their duties are to monitor the

[7] Neither of these two leads testified at the hearing.

schedule for the lines in packaging. The record evidence is not clear as to what "monitoring" the packaging lines entails. The packaging leads also take oil samples to the lab. In addition, they monitor orders in the computer system and perform other computer functions. They can operate the machines in the packaging area.

1. Jaime Sedano

a. Transfer / Recommendation to transfer

The Petitioner presented Carlos Hernandez ("Hernandez"), a receiving-department employee, as a witness at the hearing. According to Hernandez, Sedano transferred him from the packaging department to receiving department about three months ago. In this regard, Hernandez testified that Sedano told him to "go and help at receiving" and left him there. Hernandez admitted that he does not know whether Sedano received instructions from someone else to transfer him. Hernandez testified that Sedano simply told him to "go help" in receiving.

At the hearing, the Petitioner also presented employee Carlos Alban ("Alban"), who testified that Sedano told him that Sedano was going to recommend him for his current position as purchaser in the receiving department. The record is not clear as to when this conversation took place.[8] According to Alban, Sedano was the purchaser before Sedano was promoted to be a lead. Alban testified that Sedano trained Alban for two weeks for the purchaser job sometime before the official announcement was made that Sedano was going to become the packaging lead. Alban further testified that Sedano told him, "You know what, I will put my word, you know, for you to be the purchaser."

At the hearing, Alban also stated that he submitted an application for this job, and that he was interviewed by Plant Manager Jesus Valadez, Project Engineer Linsay Farrell, and

[8] Alban has worked as a purchaser for about 7 months. Presumably, the conversation happened around that time. Prior to becoming a purchaser, Alban worked in another area at the facility.

Sedano. On cross-examination, Alban admitted that he does not know what weight was given to Sedano's recommendation in the decision to move him to his current position.[9]

b. Assignment of overtime

Employee Israel Ramirez testified that Sedano has sometimes told him that he has to come in on Saturday to work overtime, but that most of the time the Employer asks for volunteers to work overtime. On rebuttal, Puig testified that the overtime schedule is made by Kelli Stiver, the production scheduler. If production is running behind, Stiver consults with Puig to determine whether overtime is necessary to catch up. The Employer tries to give employees advance notice of overtime. However, when enough notice cannot be provided, the Employer will solicit volunteers. According to Puig, Sedano's only role in this process is to write down the names of those who volunteer, and submit them to her for approval of payroll.

c. Assignment of work

The only evidence of Sedano's involvement in the assignment of work was adduced by certain questions asked by the hearing officer during Puig's testimony. Puig testified that packaging leads have assigned other workers to do certain specific task such as to go dump reprocessed oil.

2. Rafael Rodriguez

As noted above, Puig testified that packaging leads (Sedano and Rodriguez) may assign employees to go dump reprocessed oil. There is no other evidence in the record specifically pertaining to Rodriguez's duties as a lead.

[9] Puig, who was not working at the facility during the time that Alban was hired as the purchaser, testified that she does not know who approved his transfer.

C. Shipping Lead Raymond Ramirez[10]

The shipping department has one lead, Raymond Ramirez ("Ramirez"). All employees in that department work the first shift. There are a few hours during the shift when Puig is not onsite, and shipping lead Ramirez monitors the operation of the department. The record contains limited evidence detailing what Ramirez does to monitor the department. This evidence primarily comes from Puig's testimony. For example, on cross-examination, Puig testified that if a fight breaks out among shipping employees when she is away, the shipping lead will call her. She will then decide whether anyone should be sent home.

During examination by the hearing officer, Puig testified that Ramirez has assigned others to do inventory checks. Inventory is routinely checked once the end of each month for accounting purposes, but Ramirez can assign someone to do an inventory check at other times if needed. Puig further testified that Ramirez can also assign employees to move product from one area of the warehouse to another. According to Puig, Ramirez spends much of his time on what the Employer calls "Idoc failures," which means correcting computer-system communication failures. There is no other evidence in the record describing Ramirez's duties.

D. Other Evidence Related to the Supervisory Status of Leads.

Employee Alban testified that he was initially hired to work at the Employer's facility as lead-temporary worker through a staffing agency two years ago. Alban testified that when he was a lead, he fired a worker "on the spot." The record does not indicate precisely when this happened. The worker that he fired was a temporary employee who got into a fight with another temporary worker. No further details of this incident were provided at the hearing.

[10] Raymond Ramirez did not testify at the hearing.

Alban also testified that when he worked as a lead, he was not referred to as a "Supervisor One." He claims that he first heard this phrase from a manager named Mike Mattingly[11] about two weeks prior to the hearing in this case. According to Alban, he and Mattingly were discussing the Union when Mattingly mentioned that the leads were considered level-one supervisors. No other employee testified that leads are known as "level-one supervisors," and no employees testified that they view their leads as supervisors.

ANALYSIS

A. Section 2(11) Supervisor Legal Frame Work

The Petitioner asserts that the packaging and shipping leads are statutory supervisors as defined by Section 2(11) of the Act. The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). Section 2(11) of the Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment.

Under Board and Supreme Court precedent, in order to be a statutory supervisor, an individual must have the authority to effectuate or effectively recommend at least one of the supervisory indicia enumerated in Section 2(11) of the Act, using independent judgment in the interest of the employer. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001)).

[11] The record is not clear as to who is Mike Mattingly. He was described by Alban as the plant manager's boss.

Supervisory status must be established by a preponderance of the evidence. *Oakwood Healthcare, Inc.*, supra at 694. Lack of evidence is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). "[W]henever the evidence is in conflict or otherwise inconclusive on particular indicia or supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Further, job descriptions and job titles are only paper authority and are not given any controlling weight by the Board. *Avante at Wilson, Inc.*, id.; *Training School at Vineland*, 332 NLRB 1412, 1416 (2000).

In the instant case, the Petitioner has failed to meet its burden in establishing the supervisory status of the packaging and shipping leads. None of the packaging and shipping leads were presented at the hearing to testify with respect to their day-to-day duties. Only three employee witnesses testified regarding the duties of the leads to whom they allegedly report, but their testimony lacked detail. The record in general is devoid of detailed evidence as to the responsibilities and duties of the leads. Instead the Petitioner relied largely on general conclusionary statements made by the employee witnesses, and limited testimonial evidence adduced by the Petitioner during Puig's cross-examination.

The Petitioner claims that the leads are referred to by the Employer as level-one supervisors. But, the only evidence presented to support this claim was Alban's testimony that Manager Mike Mattingly made a comment to that effect. This evidence is insufficient to prove

this allegation. Although the Petitioner presented four employee witnesses, none of them testified that the leads are known as level-one supervisors or that they view their leads as supervisors. Moreover, as the Petitioner correctly noted in its brief, supervisory status is determined by an individual's duties, not by his job title or classification. As discussed below, the record evidence regarding the leads' duties failed to establish that the leads are supervisors.

B. Packaging Lead Jaime Sedano

The Petitioner contends that the packaging leads are supervisors because they can assign employees to perform specific duties, assign employees to specific departments, and assign overtime.

However, the only evidence presented regarding the packaging leads' involvement in the assignment of work was through Puig's testimony when she stated that packaging leads can ask employees to go "dump reprocessed oil." No specific examples or direct evidence of work assignments by the packaging leads were presented. Without other evidence, the act of simply asking employees to dump oil does not rise to the level of independent judgment necessary to establish that the leads exercise the requisite statutory authority to assign or direct. Accordingly, the record evidence is insufficient to establish these indicia.

As to the alleged assignment of employees to specific departments, employee Hernandez testified that Sedano transferred him from the packaging department to the receiving department. But, the only other detail provided about Sedano's involvement in this transfer was that Sedano told Hernandez to "go help out in receiving." Hernandez admitted that he did not know whether Sedano was following instructions from someone above him. The record evidence does not establish who made the decision to transfer Hernandez, nor does it fully describe the extent of

Sedano's role in the transfer. Accordingly, this evidence is insufficient to show that Sedano and the other leads have authority to transfer or reassign workers to different departments.

The Petitioner also claims that leads can effectively make hiring recommendations. In this regard, employee Alban testified that before it was officially announced that Sedano was going to become a lead, Sedano trained Alban for the position of purchaser, a position held by Sedano before he became a lead. Alban testified that Sedano told him, "I will put my word, you know, for you to be the purchaser." It is not clear on the record whether Sedano made this statement before or after he became a lead. Alban admitted that he submitted an application for the purchaser position, and that he was interviewed by the plant manager along with a project engineer and Sedano. However, the record lacks any details regarding the alleged interview or the extent of Sedano's participation in it. Accordingly, without context and explanation, I cannot find that Sedano effectively made a hiring recommendation. [12]

Likewise, there is insufficient evidence to conclude that leads have authority to assign overtime. The only evidence presented in support of this claim is employee Israel Ramirez's testimony that Sedano has sometimes told him that he has to come in on Saturdays, but that now the Employer seeks volunteers most of the time. The Petitioner did not present any further details regarding the assignment of overtime. On rebuttal, Puig testified that the lead's role in scheduling overtime is to solicit and write down the names of employees who volunteer for overtime. Thus, the record evidence failed to establish that leads assign overtime. Where there is

[12] Nor can I conclude that the leads have authority to discharge employees as contended by the Petitioner. Although employee Alban testified that he fired a temporary employee when he was a lead sometime around one or two years ago, Alban provided very limited details of this event. Even if Alban exercised independent authority to discharge an employee, that would be insufficient to establish that the current leads at issue in this case (Sedano, Rodriguez, and Ramirez) have the authority to discharge.

inconclusive evidence, the party asserting supervisory status has failed to meet its burden. *Dean & Deluca New York, Inc.*, 338 NLRB at 1048.

The Petitioner did not present other evidence of Sedano's supervisor authority. Therefore I find that Petitioner failed to meet its burden to prove that Sedano is a supervisor as defined in Section 2(11) of the Act.

C. Packaging Lead Rafael Rodriguez

The only record evidence regarding the duties of packaging lead Rodriguez was testimony by Puig stating that packaging employees (Sedano and Rodriguez) can assign employees to go "dump reprocessed oil." For the reasons discussed above, this evidence is insufficient to establish that the packaging leads are statutory supervisors. Therefore, I find that the Petitioner failed to meet its burden to prove that Rodriguez is a supervisor as defined in Section 2(11) of the Act.

D. Shipping Lead Raymond Ramirez

The Petitioner suggests that leads are supervisors because they monitor the operations of their department and are accountable for their performance when Puig is away from the plant. Puig admitted that she is away from the facility during a portion of the shipping department's shift, and acknowledged that the shipping lead (Ramirez) monitors the department during this time. However, no evidence was produced by the Petitioner to explain what Ramirez does to "monitor" the department.

The only other evidence that was presented regarding Ramirez's duties was Puig's testimony that Ramirez can assign employees to do inventory checks or to move product from one part of the warehouse to another. This limited evidence suggests that these assignments are merely routine and ministerial. Thus, the evidence is insufficient to show that Ramirez exercised

any supervisory authority. Therefore, I find that the Petitioner failed to meet its burden to prove that shipping lead Ramirez is a Section 2(11) supervisor as defined in the Act.

CONCLUSION

Based on the entire record in this matter and in accordance with the discussion above, I find and conclude that:

1. The hearing officers' rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner did not meet its burden of establishing that the packaging and shipping leads are supervisors as defined in Section 2(11) of the Act. Therefore, the petitioned-for unit is inappropriate because it excludes the packaging and shipping leads.

5. Since the Petitioner does not wish to proceed to an election in any alternate unit if the petitioned-for unit was deemed to be inappropriate, I hereby dismiss the Petition.

ORDER

IT IS HEREBY ORDERED that the Petition in this matter, be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by September 25, 2014. The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov,[13] but may not be filed by facsimile.

DATED at Los Angeles, California, this 11th day of September, 2014.

Olivia Garcia
Regional Director, Region 21
National Labor Relations Board

[13] To file the request for review electronically go to www.nlrb.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlrb.gov.

EXHIBIT 2

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 21-RC-133636

Cargill, Inc.

and

United Food &
Commercial Workers
International Union,
Local No. 324

POST-HEARING BRIEF OF CARGILL, INC.

Prepared by:

OGLETREE, DEAKINS, NASH,
SMOAK AND STEWART, P.C.

Douglas M. Topolski, Esquire
1909 K Street, Suite 1000
Washington, DC 20006
202.263.0242 (phone)
202.887.0866 (fax)

Ruth L. Goodboe, Esquire
34977 Woodward Avenue, Suite 300
Birmingham, Michigan 48009
248.723.6143 (phone)
248.593.2603 (fax)

Attorneys for Cargill, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

In the Matter of:

CARGILL, INC.,

Employer,

and **Case No. 21-RC-133636**

UNITED FOOD & COMMERCIAL WORKERS UNION LOCAL NO. 324,

Petitioner.

EMPLOYER'S POST HEARING BRIEF

Employer Cargill, Inc., (the "Employer"), through undersigned counsel, respectfully submits this post hearing brief. For the reasons discussed below, the Regional Director should decline to employ the test set out in *Specialty Healthcare and Rehabilitation Ctr. of Mobile*, 357 NLRB No. 83, 2011 NLRB LEXIS 489 (2011) and use the community of interest standard that has been accepted by the National Labor Relations Board ("the Board") for decades. Additionally, and regardless of the standard used, the Regional Director should reject the Union's proposed unit as not appropriate. The Regional Director should order an election only in a unit that includes all packaging, shipping, receiving, maintenance, lead, terminal, and quality or lab employees and excludes office clerical employees, professional employees, staffing agency employees, guards and supervisors as defined in the National Labor Relations Act ("the Act").

I. INTRODUCTION AND PROCEDURAL HISTORY

The Petitioner United Food & Commercial Workers Union Local No. 324 (the "Union") filed the above captioned matter on July 28, 2014. *See* Board Exhibit 1(a). The Union sought an

election in the following unit at the Employer's Fullerton California consumable oils production facility ("the facility"):

> Included: All Full time and Part time regular production employees
>
> Excluded: Managers, supervisors, leadmen [sic], office clerical, temporary employees (temps) and guards as defined in the act [sic].

Later, and prior to the hearing in this matter, the Union changed this position and claimed to seek only a unit of packaging and shipping employees. The Union changed its position again before the hearing. It amended its petition on the record and now seeks a unit of packaging, shipping, and receiving employees excluding all others that work at the facility. *See* Tr. 11[1].

A hearing was conducted in this matter on August 12, 2014. The record makes plain that the unit sought by the Union is not appropriate. The record establishes instead that the Fullerton facility is a single and fully integrated processing and packaging operation where all employees share an overwhelming community of interest. Thus, the only appropriate unit consists of the unit sought by the Employer and it is in this unit that an election should be ordered.

II. THE RECORD FACTS

A. The Employer's Operation

The plant at issue is located in Fullerton, California. It blends and ships consumable oils. Tr. 24-25. The oil is received in bulk by rail or tanker truck. Tr. 26 and Employer Exhibit 1 at areas 1 and 2. After being tested at the facility's laboratory (Employer Exhibit 1 at area 15), it is stored in the terminal area for further processing or shipping. Tr. 26 and Employer Exhibit 1 at areas 3, 4, and 5. Oil can be blended. Tr. 27-28 and Employer Exhibit 1 at areas 5 and 7. Blended and unblended oil can have its viscosity adjusted. *E.g.* Tr. 62 and Employer Exhibit 1 at

---

[1] All transcript references refer to the transcript of the hearing in this matter held on August 12, 2014.

areas 5, 8 and 15. Oil can be loaded on to tanker trucks and shipped in bulk. Tr. 27 and Employer Exhibit 1 at area 6. It can also be packaged in a variety of forms and shipped via truck. Tr. 28 and Employer Exhibit 1 at areas 3 through 5 and 7 through 11.

The manner in which oil is processed and packaged for shipping is established by Kelly Stiver, the facility production scheduler. Tr. 40. She bases her schedules on customer demand. Once scheduled, the packaging lines are overseen by the line operators. Tr. 152 -53. Shipping is controlled by a process that serves trucks in the order they present themselves to the facility for loading. Tr. 30, 154.

Currently the Employer employs approximately 60 employees excluding those not sought to be included in the voting unit by either party in this matter. Tr. 15, 266-68 and Employer Exhibit 2. Generally they work three shifts (first, second and third). *See* Employer Exhibit 2. As discussed below, each employee in this single integrated process has an overwhelming community of interest with all other employees in the process.

B. The Terminal Employees.

As explained above, oil is received at the facility by rail or by truck. There currently are eight terminal employees. Employer Exhibit 2. They work all three shifts. Terminal employees make first (and sometimes last) contact with these bulk shipments. Some align and unload rail cars. Tr. 37 and Employer Exhibit 1 at area 1. Some unload trucks. Tr. 41, 45, and 47. Employer Exhibit 1 at area 2. In each case, however, the terminal employee must physically walk a sample of the received oil to the lab building for analysis before the incoming shipment can be unloaded. Tr. 37 and Employer Exhibit 1 at areas 1 and 15 or 2 and 15. Thus, lab techs are in regular daily contact with terminal employees. Additionally, terminal employees will converse with votator employees in the packaging area to discuss delivery of oils from the

votator machine to the area where outgoing tanker trucks are loaded for customer delivery. Tr. 84-86 and Employer Exhibit 1 at area 5, 8 and 15. Thus, terminal employees can handle the oil at the last stage of the process, the shipping process, as well. The Union's witnesses concede that terminal employees are seen in the packaging areas for various purposes from time to time. *E.g.* Tr. 215, 246-47 and Employer Exhibit 1 at areas 5, 6, 8, 9, 10 and 13. It is undisputed that maintenance mechanics traverse throughout the facility on a regular if not daily basis to make repairs. *E.g.* Tr. 236. Thus, there is clearly regular interaction between the maintenance department employees and terminal employees. Employer Exhibit 1 at areas 3 through 7 and 13.

Further, almost half of the current terminal employees transferred from the packaging department to terminal area jobs on a permanent basis. *E.g.* Tr. 39-40, 44-45, and 49.[2] Moreover, the Union's own witness Carlos Alban ("Alban") concedes that he filled in for employees and worked in the maintenance shop located in the terminal area Tr. 213-14 and Employer Exhibit 1 at areas 17 and 13. Thus, there is regular interaction as well as temporary and permanent transfer of employees from the unit sought by the Union to areas the Union seeks to exclude.

---

[2] The Union tried to suggest, without any evidence, that some of these transfers might have been temporary staffing employees when the transfers were made from packaging to the terminal area. Tr. 126-27. Even if true in part, and there is nothing in the record to support this guess, the observation is irrelevant. The undisputed facts are that all of these transfers are employed by the Employer, worked in packaging, and then transferred permanently to terminal where they work today.

C. The Quality or Lab Employees

There currently are four lab techs (or quality employees –the terms are interchangeable[3]) working on the first and third shifts. Tr. 51-68 and Exhibit 2. They operate out of the lab building marked as area 15 on Employer Exhibit 1. Tr. 31. Oil does not move from one area of the plant until after it is tested by these employees. Tr. 51-52. Thus, and as mentioned above, terminal employees bring samples to the lab for testing when the tank cars or trucks are received. Tr. 36-40 and Employer Exhibit 1 at areas 1, 2, and 15. Other terminal employees will bring samples as oil moves through the terminal area. *E.g.* Tr. 41 and Employer Exhibit 1 at areas 3 through 7 and 15.

Samples are brought multiple times on a daily basis from the packaging area to the lab building. Employer Exhibit 1 at areas 8, 9, 10, and 15. Thus, leads bring oil samples from the lines in the packaging area and the holding tanks in the terminal area to the lab multiple times per day. Tr. 60, 82. If a lead is not available, the reliever or another operator may bring the sample. *Id.*; *see also* Employer Exhibit 1 at areas 5, 9, and 15. Votator operators bring samples to the lab a minimum of one time a day and in many cases more often, depending on whether there are problems with viscosity measurements or how many different types of oil are run through the votator that day. Tr. 53-54, 84-85 and 129-30. Each type of oil run through the votator on any given day must be delivered to the lab by the votator operator and tested by the lab employees one or more times. Tr. 85 and 129 and Employer Exhibit 1 at areas 8 and 15. Similarly, the three OLE line operators regularly take samples from their work area to the lab. Tr. 71, 74, and 83 and Employer Exhibit 1 at areas 9 and 15.

---

[3] At the hearing, the parties stipulated that references to "lab employees" in the transcript refer to quality employees. Tr. 39.

Similarly, lab employees regularly visit the packaging area for performance of their job functions. For example, lab tech Steve Lim walks the packaging and shipping floor at least twice a week with a rabbi to ensure that Kosher standards are being met. Tr. 54-56. He and the other lab techs also make regular visits to do such things as monitor sanitation standards and requirements, check and collect paperwork, and check on the new OLE line which runs several times a week. Tr. 54-58 and 61. Thus, there is daily, regular and constant interaction between and among lab, packaging and terminal employees.

D. The Packaging Employees

There are approximately 23 packaging employees working on three shifts. Tr. 68-92 and Employer Exhibit 2. They operate regularly four packaging lines: the 5 quart line; the 35 lb. JIB (jug in a box line); the 50 lb. cube line; and the OLE line. Tr. 68-69. Again, and as made clear above, these employees have regular daily contact with other groups the Employer seeks to have included in the unit.

For example, the two packaging leads regularly take oil samples from the line to the lab area, usually several times per day. Tr. 82-83 and 89 and Employer Exhibit 1 at areas 9 and 15. Relievers, whose job is to fill in for any employee, also take samples to the lab, particularly when leads are busy or otherwise unavailable. Tr. 60, 70-71, and 82. Additionally, machine operators also take samples to the lab from time to time. Tr. 60 and Employer Exhibit 1 at areas 9 and 15.

The two votator operators operate a special piece of machinery designed to adjust the viscosity of the oil. Tr. 83-86 and Employer Exhibit 1 at area 8. They must take and submit a sample to the lab every time they run a type of oil. This happens at least once a day and frequently more often. *Id.* and Tr. 129. Employer Exhibit 1 at areas 8 and 15. Votator operators also have regular phone contact with loaders in the bulk truck loading area of the terminal to

discuss when oil will be ready for bulk loading. Tr. 86 and Employer Exhibit 1 at areas 8 and 16.

Similarly, the OLE operators are required to take samples to the lab. This happens several times a week as well. Tr. 71, 74, and 83 and Employer Exhibit 1 at areas 9 and 15.

Thus, at least nine of the 23 packaging employees (two leads, two relievers, two votator operators and three OLE operators) are required to deliver samples to the lab in the terminal area as a part of their regular, if not daily, job duties. The votator operators also are in daily contact with loaders in the terminal area.

Further, union witness and the packaging "super user" Jose Padilla, an employee trained to assist other packaging employees with use of the relatively new SAP computer systems, admits he sees maintenance employees in the packaging area. He concedes that the week before his testimony he was in the terminal building (Employer Exhibit 1 at area 14) working on a "collaboration." He further concedes that in February through May his duties took him to that building in the terminal area on a regular basis. Tr. 233-35 and Employer Exhibit 1 at areas 18 and 14. This makes 10 of 23 packaging employees whose duties regularly take them to and/or are in daily communication with employees working in the terminal area.

Packaging employees are also visited regularly by those who operate from the terminal area. As described above, lab employees regularly visit the packaging area for a variety of reasons. Tr. 63 and Employer Exhibit 1 at areas 8, 9, 10, and 15. Kimberly Cruz, the engineering administrative assistant, regularly visits and consults with operators to help plan engineering projects. Tr. 71-73 and Employer Exhibit 1 at areas 8, 9, and 14. Even the Union's witnesses concede that maintenance mechanics are in the packaging area on a frequent or even daily basis to address equipment issues with operators and leads. Tr. 199, 228-229, 247 and

Employer Exhibit 1 at areas 8, 9, and 13. They also confirm that lab and terminal employees visit the packaging area regularly. Tr. 241, 247 and Employer Exhibit 1 at areas 8, 9, and 1 through 7.

Finally, packaging employees regularly advance from their entry level positions in packaging to the terminal area. Tr. 39-40, 44-45 and 49 and Employer Exhibit 1 at areas 9 and 1 through 7. As noted above, three of the current eight terminal employees transferred from packaging to their current terminal area positions.

Thus and again, it is plain that packaging employees are an integral part of a singular operation and have an overwhelming community of interest with employees all other employees working at the facility, including those in the terminal area.

E. The Shipping Employees

The Employer currently has nine shipping employees working one (first) shift. Employer Exhibit 2. Four of these employees load trucks. Tr. 96-104 (Messrs. Espinoza, A. Ramirez, Ramos, and Talbert). The others are plant clericals. Josh Ennault coordinates incoming trucks for loading and may help load as well. Tr. 96-97 and Employer Exhibit 1 at areas 11 and 18. Leonard Garcia is the inventory controller. Tr. 100-01. He sits in the front office area. *Id.* and Employer Exhibit 1 at area 18. He checks for order discrepancies and oversees stock transfers to third party logistics providers. Eddie Padilla is an SAP "super user" and helps coordinate application of the SAP software throughout the packaging operation, including coordination with terminal functions. Tr. 101-02, 233 and Employer Exhibit 1 at areas 18, 8, 9, and 14. Raymond Ramirez is the shipping lead. He spends most of time addressing computer issues. Tr. 102. Donna Teuscher is the transportation coordinator. She schedules package trucks and monitors bulk trucks for changes. Tr. 103 and Employer Exhibit 1 at areas 6, 11 and 18.

Trucks are loaded in the order they come to the building. Tr. 96-97. Thus, this department runs on a process that is well understood by the loaders and plant clericals. Tr. 154. There is no dispute that they are part of the integrated operation explained by the Employer. Tr. 11.

F. The Receiving Employees

The Employer currently has two receiving employees and one purchaser who work in the receiving area. Tr. 93-95. The receivers operate forklifts to unload and store raw materials entering the facility. Tr. 94-95 and Employer Exhibit 1 at areas 17 and 12. There is no dispute that these employees are called upon to pick up materials located in the terminal area of the facility for delivery to the receiving area and other areas of the plant. Tr. 94-95 and 245 and Employer Exhibit 1 at areas 11, 14, and 18. The purchaser, union witness Alban, concedes that he regularly interacts with employees in the shipping, receiving and packaging areas. Tr. 187 and Employer Exhibit 1 at areas 8, 9, 10, 11, 12, and 18. He admits that he sees maintenance and terminal employees in these areas. Tr. 215. He also admits that he has been called upon to fill for a maintenance employee in terminal area 13. Tr. 213. Further, he attends daily production meetings with employees from other the terminal area of the plant. Tr. 93-94.

Again, the evidence shows regular interaction between these employees and others in and from the terminal area.

G. The Maintenance Employees

There currently are four maintenance employees working on three shifts. Employer Exhibit 2. All of them work from a building in the terminal area. Tr. 104 and Employer Exhibit 1 at area 13. The Union concedes, as it must, that the mechanics regularly work in the packaging area. Tr. 199, 228-229, 247 and Employer Exhibit 1 at areas 8, 9, and 13. Indeed, to do

otherwise would be to deny the obvious as common sense requires one to recognize that maintenance mechanics will constantly be working in all areas of the facility to address whatever needs arise anywhere on the property. Tr. 104-08 and Employer Exhibit 1. Further, it is undisputed that the maintenance scheduler also works in all areas of the property all the time interacting with employees to plan for scheduled maintenance projects. Tr. 105-07. These employees are a fully integrated part of a single production process.

H. The Lead Employees

There are three lead employees. Two are production leads (Jaime Sedano first shift and Rafeal Rodriguez second shift). Raymond Ramirez is the packaging lead.

First, there is no evidence whatsoever to support any claim by the Union that Lab Tech 3 Steve Lim is even a lead employee, much less a supervisor. *E.g.* Tr. 54-56. He is not called a lead. Indeed, no one at the hearing even mentioned that anyone ever heard him called lead. There literally is no evidence that he ever exercised any indicia of supervisory status as set out in Section 2(11) of the Act.

Second, the packaging leads generally are responsible for monitoring the schedule for three packaging lines. They take samples from the packaging lines to the lab in the terminal area. Tr. 82-83 and Employer Exhibit 1 at areas 9 and 15. They also perform computer functions and update software as products proceed through the packaging lines. *Id.* They operate machines when necessary.

It is undisputed that they do not hire, fire,[4] transfer,[5] discipline, suspend, lay off, recall, promote, adjust grievances, or discharge employees. Tr. 166. To the extent leads might assign

---

[4] Union Witness Alban contends that he fired someone while he was a lead and that a former supervisor told him he could do so. Tr. 184-85. Deceptively omitted from this testimony until

work at all, the work is ministerial in nature. Thus, there is nothing in the record referring to this element of supervisory status other than that Mr. Sedano may have told someone to dump reprocessed oil or that Mr. Ramirez might have instructed some employee to perform scheduled or routine materials audits. Tr. 167-68.

Similarly, there is no evidence in the record at all that shipping lead Ray Ramirez exercises any indicia of supervisory status. The only thing suggested by the record is that he assigns employees to help complete periodic audits called cycle counts. Tr. 167-68.

None of these employees are statutory supervisors. Indeed, no union witness testified that he considered any lead his supervisor. All leads should be included in the unit of eligible voters.

---

brought out on cross examination was the essential facts that he allegedly did this while employed by a temporary agency, not the Employer, and that he allegedly fired another temporary employee and not an employee of the Employer. Tr. 195. Neither he nor anyone else gave any examples of any lead person employed by the Employer taking any disciplinary action against employee of the Employer. Indeed, Alban's testimony was characterized by a series of inaccurate generalities which were revealed to be untrue when pressed on cross examination. *Compare* Tr. 184-85 with 195 (omitting the fact he allegedly terminated someone for an entity other than the Employer); 188 and 215 (claiming he only saw one person lab person from the terminal side then later admitting he saw others, including a maintenance employee the day before he testified); Tr. 198 (refusing to admit that he could not see who was in other areas of the facility while he was sitting in his office even though counsel for the Union readily agreed to stipulate to this obvious fact). He is a completely unreliable witness.

[5] Alban also contends that he was "transferred" to his current position by packaging lead person Sedano. Tr. 189-90. Consistent with his other inaccurate generalities, though, Alban could not even be sure that Mr. Sedano was lead person at the time of this "transfer" (Tr. 204-05), admitted that he was interviewed by someone outside the packaging chain of command (Tr. 203-04), and no idea what weight, if any, Sedano's alleged recommendation might have had (Tr. 205). Similarly, Union witness Carlos Hernandez alleges that Sedano "transferred" him to receiving when Mr. Sedano merely instructed him to report receiving. Tr. 233-34. Again, he had no idea at all from where Mr. Sedano's alleged instruction might have come. Tr. 249. He also said that Sedano instructed him to run a palletizer. Tr. 250. Significantly, there is no evidence in the record that anyone gave Sedano any power to transfer anybody. The Union made no effort to subpoena him. The Union did not offer any evidence that any other lead person ever did or tried to transfer any employee.

I. Other Relevant Facts.

In addition to the conclusive evidence of overwhelming community of interest set out above, the following facts are also relevant: packaging, receiving, shipping, and terminal are all supervised by Stephanie Puig ("Puig") and this is not the first time that this has been the case (Tr. 92-93 and 113-15); all employees in the unit sought be the Employer have the same employee benefits (*e.g.* Tr. 164); employees in the unit sought by the Employer have the same general pay range (Tr. 162-64); any employee may use any of the break rooms on the premises, including the one in the terminal area (Tr. 110-12); any employee may use any of the time clocks located throughout the facility, including the one in the terminal area (Tr. 171); employees from all areas of the facility, including union witness Alban, attend the daily 10:00 a.m. production meeting held in the packaging area of the plant (Tr. 93-94 and Employer Exhibit 1 at area 16); there is no assigned parking by classification and employees may park anywhere near the plant that is convenient to them. Tr. 140-45. The maintenance department will be moving to the same building as the packaging operation in the near future. Tr. 178-79.

III. ARGUMENT

A. The Regional Director Should Not Utilize the Community of Interest Test Set Out In *Specialty Healthcare* and Should Instead Return the Board's Traditional Community of Interest Test.

In *Specialty Healthcare and Rehabilitation Ctr. of Mobile*, 357 NLRB No. 83, 2011 NLRB LEXIS 489 (2011), a three to one decision by a four-member Board consisting of members Wilma Liebman, Craig Becker, Mark Pearce, and Brian Hayes (dissenting) changed the manner in which appropriate units are decided. In essence, the Board set a new standard "...for those cases in which an employer contends that a proposed bargaining unit is inappropriate because it excludes certain employees. In such cases, the Board stated that the

employer will be required to show that the excluded employees share an 'overwhelming community of interest' with petitioned for employees." *Id.*, slip op. at 14.

It is well-recognized that Board tradition requires a complete Board and a three-member majority to overturn existing precedent. *See Local Joint Executive Bd. of Las Vegas v. NLRB*, 657 F.3d 865, 866-867 (9th Cir. 2011). Nevertheless, in *Specialty Healthcare,* the Board overturned long standing precedent with only two validly appointed members in the majority.

In *New Vista Nursing and Rehabilitation v. NLRB,* 719 F.3d 203 (3rd Cir. 2013) (rehearing granted August 11, 2014), the Third Circuit invalidated the appointment of Member Becker which occurred one day after the Senate recessed for two weeks. While the legality of Member Becker's appointment might have been left unresolved by the Supreme Court's decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), the certainty that Member Becker's appointment will be found unconstitutional was not.

The Supreme Court repeatedly recognized that confirmation with advice and consent of the Senate is the preferred method of appointment. *Noel Canning,* 134 S. Ct. at 2558-59 and 2575. The Court also emphasized that the Recess Appointment Clause was not designed to resolve political disagreements between the Executive and Legislative Branches of the federal government. *Id.* at 2567 (political opposition alone is not enough to overcome presumption) and 2577 (the Recess Appointments clause was "not designed to overcome serious institutional friction").

Member Becker was appointed one day after the Senate began a short recess from March 26 to April 10. *E.g. New Vista,* 719 F. 3d at 213, 218. This appointment was made after the Senate took procedural steps to reject his nomination. "Cloture Motion on Craig Becker, of Illinois, to be a Member of the National Labor Relations Board: Role Call Vote No. 22."

Congressional Record (February 9, 2010) p. S527-528. Available from: Library of Congress (Thomas Online database); Accessed: 8/18/14. Thus, regardless of whether the recess is deemed presumptively too short to allow for the recess appointment of Member Becker under the standard articulated in *Noel Canning*, it is clear that the appointment nevertheless constitutes exactly the type of political end run by the Executive branch around the Legislative branch that the Supreme Court stated was improper.

Given that Member Becker's appointment will not survive a constitutional challenge, it is clear that the standard articulated in *Specialty Healthcare* will not survive further judicial scrutiny. At best, the Board had only three validly appointed members at the time it decided *Specialty Healthcare.* Thus, it failed without any reason to adhere to its tradition of deciding precedent setting cases by a majority of a full five member Board. Indeed, if the Board had just four members (assuming Member Becker's appointment is not valid), it is quite possible that *Specialty Healthcare* would have been a two to two decision with no change in the law. Under these circumstances, it is not appropriate to employ the standards of *Specialty Healthcare* at this time.

Finally, the Board in *Specialty Healthcare* recognized that single plant units historically are presumptively appropriate. *Specialty Healthcare,* 357 NLRB No. 83, slip op. at 7 fn. 16 (citing *Hilander Foods,* 348 NLRB 1200 (2006)). Regardless of whether the Regional Director decides to use *Specialty Healthcare* or some other more traditional approach to decide the unit issues raised in this matter, the well-recognized presumption that a single plant unit is appropriate should be applied to the facts of this case. As discussed in detail below, the Employer operates a single integrated process at the facility at issue. Employees in all areas of the facility and at all stages of the process interact with each other and rely upon each other to do

their jobs. They transfer from position to position on both temporary and permanent bases and assist each other across classifications. If the Union is allowed to fracture this process by carving it up into little pieces, this could easily have the effect of inhibiting the exercise of Section 7 rights by affected employees. Thus, fragments of the employees working at the plant might have to make choices about transfers, cross training, and other decisions that enhance their ability to advance and secure their employment based upon whether they desire to exercise their Section 7 right to belong or not belong to a labor organization. Performance of duties within the plant could be confused by conflicting work rules that can create serious safety concerns in an operation like that at issue here.

As a result, it is bad law and bad policy to allow the Union to fracture the single integrated production process at issue in this case. For these reasons, as well as those discussed below, the Regional Director should conclude that the Union's proposed unit is not appropriate in these circumstances and that the only appropriate unit is the one proposed by the Employer.

B. Regardless of the Standard Used, the Unit Sought by the Union is Inappropriate

It is clear under any analysis that the maintenance, terminal, and quality employees belong in the appropriate unit. The Region should so conclude. Under the Act, any petitioned-for unit must be "an appropriate unit." *In re Boeing*, 337 NLRB 152 (2001) (smallest appropriate unit must include ***all*** production employees due to highly integrated work, regardless of separate supervision and work areas). While the unit need not be the "only appropriate unit" or the "most appropriate unit," the Board must nonetheless determine that the petitioned-for unit is "appropriate." *Id.* While the Union is free to petition for whichever employees it desires, the Region must recognize the longstanding principle that "the Board cannot stop with the observation that the petitioner proposed the unit" and instead must determine if the proposed unit

is appropriate. *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 9 (*citing Metropolitan Life Ins. Co.*, 380 US 438, 442 (1965)).

The Board stated in *Seaboard Marine, Ltd.*, 327 NLRB 556 (1999) that "it is well established that the Board does not approve fractured units, *i.e.*, combinations of employees that are too narrow in scope or that have no rational basis." *Id.* (*citing Colorado National Bank of Denver*, 204 NLRB 243 (1973)). In *Seaboard Marine*, the Board held that the petitioned-for unit of employees was inappropriate because the employees "d[id] not share a sufficiently distinct community of interest from other employees to warrant a separate unit and, therefore, that the unit grouping sought by the Petitioner is an arbitrary one." *Id.* (*citing Brand Precision Services*, 313 NLRB 657 (1994); *Transerv Systems*, 311 NLRB 766 (1993)).

As the Board held in *TDK Ferrites Corp.*, 342 NLRB 1006, 1008 (2004), a union's attempt to selectively petition for "maintenance department employees, production technicians, tool specialists, and set-up specialist" separate from the rest of the employer's production employees in their "highly integrated" operation, was inappropriate. *Id.* The Board held that, based on the high degree of interaction of petitioned-for employees with non-petitioned-for employees and other shared community of interest factors, the unit was not "composed of a distinct and homogeneous group of employees with interests separate and apart from other employees at the Employer's plant" and, therefore, such a unit could not be justified. *Id.*

The Board reaffirmed these principles in *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 13:

> A petitioner cannot fracture a unit, seeking representation in "an arbitrary segment" of what would be an appropriate unit. *Pratt & Whitney*, 327 NLRB 1213, 1217 (1999). "[T]he Board does not approve fractured units, i.e., combinations of employees that ... have no rational basis." *Seaboard Marine*, 327 NLRB at 556 (1999).

The Board also held that when there are "no rational basis for excluding" groups of employees from other petitioned-for employees who share little or no more community of interest than those petitioned for, the unit is inappropriate. *Odwalla, Inc.*, 357 NLRB No. 132 (2011). The Board said "none of the Board's traditional community-of-interest factors suggests that all the employees in the recommended unit share a community of interest that the [non-petitioned-for employees] do not equally share, such that the community-of-interest factor would reasonably support drawing the unit's boundaries to include [the petitioned-for employees], but *not* the [non-petitioned-for employees]." The Board in *Odwalla, Inc.* cited the language of *Blue Man Group, LLC v. NLRB,* 529 F. 3d 417, 421 (D.C. Cir. 2008), stating there is "no legitimate basis upon which to exclude" the [non-petitioned-for employees] while at the same time including all the other classifications in the recommended unit." 357 NLRB No. 132, slip op. at 5.

The maintenance, terminal, and quality employees do not share a distinct community of interest from the packaging, shipping, and receiving employees as to justify their exclusion from any bargaining unit. Exactly the opposite is true. They share equally the same community of interest as those in the Union's proposed unit share with each other.

In assessing whether employees share a community of interest, the Board examines a variety of factors, including: 1) similarity in method of wages or compensation; 2) similarity in hours of work; 3) similar employee benefits; 4) shared supervision; 5) the degree of similar qualifications, training, and skills; 6) similar job functions; 7) frequency of contact with other employees; 8) integration with the work functions of other employees or interchange with them; and 9) history of bargaining. *See Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962). Applying these factors to the unit proposed by the Union demonstrates that the unit is obviously fractured and must include all of the employees sought by the Employer.

1. The Employees in the Unit Sought by the Employer Are So Functionally Integrated That They Must Be Included In Any Appropriate Unit

Under the Board's well-established policy against fractured units, the unit sought by the Union is not appropriate as excluding the maintenance, terminal, and quality employees would arbitrarily exclude employees who have a community of interest with them. The employees in the unit sought by the Employer have frequent interaction and are part of a single functionally integrated process of packaging and shipping consumable oils. Each classification sought be included by the Employer relies on all the other classifications sought by the Employer in order to complete their necessary duties. As set forth above, oil is received and samples are taken from this oil to and from numerous parts of the facility by a large variety of packaging and terminal employees during many parts of the blending, packaging and shipping process.

During this single integrated process, terminal employees are frequently in the packaging area and vice versa, maintenance employees work throughout the facility, and the lab techs frequently interact with packaging and terminal employees in both the terminal and packaging areas of the facility. Employees are not restricted to a particular work area and, as the Union acknowledges, the employees in the unit sought by the Employer have frequent and, indeed, daily contact with each other. All of this interaction is part of one integrated production process and one part of the production cannot occur without the other parts functioning and assisting.

The Board has routinely held that employees who have this level of regular, job-related contact with petitioned-for employees in a functionally integrated operation *must* be included in any unit found to be appropriate. *See, e.g., Publix Super Markets*, 343 NLRB 1023, 1025 (2004) ("[T]here is a significant amount of functional integration . . . , which results in a significant amount of work-related contact among employees."); *Caesars Tahoe*, 337 NLRB 1096, 1100 (2002) (including an engineering coordinator in a unit of maintenance technicians, in part,

because he interacted with the technicians daily during his dispatching duties and in walk-throughs); *Virginia Manufacturing Co.*, 311 NLRB 992, 993 (1993) (holding it was error for the Regional Director to exclude a technical employee from the unit, saying his "regular contact with other unit employees, his receipt of identical benefits, and the degree to which his job is functionally integrated into the basic production processes are sufficient to establish a community of interest").

Further, as the Board noted in *Clinton Corn Processing Co.*, 251 NLRB 954 (1980), where the employer's corn syrup production process was a highly integrated production process with substantial functional and operational integration, the employees shared a community of interest requiring a single bargaining unit. In so finding, the Board held that the disputed employees' functions "are critical to the entire manufacturing process, and that, as noted by the Employer if any one of those functions becomes inoperable, 'The process must stop; goes down.'" *Id.* at 955.

The same is true for the employees in the unit sought by the Employer. The production process at the Employer's facility is highly integrated and the employees in the unit sought by the Employer have frequent interaction. As noted by the Board in *Clinton Corn Processing*, without any of the employees sought by the Employer to be included in the unit, production could not occur. Each of the employees sought for inclusion by the Employer are required pieces in the single process of preparing the bulk oil for shipment to customers. Just like the shipping and receiving employees, the maintenance, quality, and terminal employees are "critical to the entire manufacturing process." 251 NLRB at 955. Therefore, their inclusion in any appropriate bargaining unit is equally essential.

2. The Same Supervisor Oversees and Supervises All Packaging, Receiving, Shipping, and Terminal Employees Who Obviously Share Common Supervision

In addition, the employees in the unit sought by the Employer are overseen by virtually one supervisor and therefore, obviously share supervision. In *TDK Ferrites Corp.*, 342 NLRB at 1009, the Board found that where all employees were supervised and evaluated by the same supervisors, applying identical rules and policies, and subjecting them to the same discipline and rewards, a unit that did not include all employees under these supervisors was inappropriate. As set forth above, all of the packaging, receiving, shipping, and terminal employees currently are supervised by Puig.[6] Puig is the direct supervisor of all of these employees and directly controls and directs their day to day work. If the Union's petitioned-for unit is found appropriate, only some of Puig's reports will actually be in the bargaining unit. This could lead to differing terms and conditions of employment for employees under Puig's control. The Region should not permit such a fractured unit. Such common supervision further demonstrates the community of interest between the packaging, receiving, shipping, and terminal employees.

Even if a new terminal supervisor is hired, there is no evidence that the employment conditions in the terminal area are any different than in the unit sought by the Union or that these identical conditions will change. Maintaining continuity throughout the facility is essential and requires one plant wide unit.

---

[6] The Union made mention of the fact that Puig does not supervise all terminal employees all the time. The fact of the matter is that Puig has supervised both groups of employees on two separate occasions and her current status as supervisor for both groups is likely to continue for some time.

3. The Employees in the Unit Sought by the Employer Share Identical Benefits and Terms and Conditions of Employment Warranting the Finding of a Single Unit

The employees sought by the Employer for inclusion in the unit also share the same terms and conditions of employment. All employees share the same benefits and are on the same general pay scale. Such common terms and conditions of employment further evidence the community of interest all of the employees share. The Board has long recognized, common terms and conditions of employment such as those found in the instant case further emphasize a community of interest. In *J.C. Penney Co.*, 86 NLRB 920 (1949), the Board recognized that where employees shared similar terms and conditions of employment and of benefits, in conjunction with common supervision, such employees shared a community of interest requiring inclusion in any appropriate bargaining unit. *See also, International Bedding Company (IBC of Pennsylvania)*, 356 NLRB No. 168 (2011) (Where all employees engaged in the production of mattresses and shared benefits, work rules, employee meetings, break rooms, and some common supervision, a plant-wide unit was appropriate).

Under well-established Board precedent, there is no logical reason for excluding maintenance, terminal, and quality employees from the bargaining unit where they share the same working conditions and are so intertwined with the shipping, receiving, and packaging employees. *Odwalla, Inc.*, 357 NLRB No. 132 (2011).

4. All Employees Have Frequent Contact and Interact as Part of Their Daily Duties

In addition to the functional integration and frequent contact between employees in the completion of their job duties set forth above, all of the employees in the unit sought by the Employer use the same break rooms, time clocks, and parking areas. Packaging employees interact with employees in the terminal areas on a daily basis. They physically carry oil samples to the lab, talk to bulk delivery terminal employees on the phone, discuss breakdowns with

maintenance techs, and attend daily meetings among the groups. This frequent interaction is essential to completion of both the process at the facility and for the completion of the employees' duties. Even the Union acknowledges this frequent interaction between and among employees throughout the facility. This further supports the Employer's position that the unit sought by the Union is inappropriate and that the only appropriate unit is the one sought by the Employer.

5. Employees Frequently Interchange and Transfer Within Positions

In addition to the day-to-day integration between positions, the evidence establishes that many of the packaging employees have transitioned to positions within the terminal. In conjunction with the functional integration of the positions, such transfers further support the conclusion that all of the employees sought by the Employer share a community of interest. As the Board held in *Buckhorn Inc.*, 343 NLRB 201, 203 (2004), where there were permanent transfers between the two groups of employees and two-thirds of the employees in the maintenance department (which the union sought to exclude) were hired from the ranks of production employees (the only employees sought by the union), the unit sought was inappropriate because the maintenance and production employees shared a community of interest. *Citing TDK Ferrites Corp.*, 342 NLRB 1006, 1009-1010 (2004); *Greater Bakersfield Memorial Hospital*, 226 NLRB 971, 973 (1976). In the instant case, almost half of the employees in terminal have transferred from packaging. As the Board held in *Buckhorn Inc.*, where employees have such interchange and frequently engage in permanent transfers, the only appropriate unit includes all employees.

6. Summary

For all of the reasons set forth above, the only appropriate unit is one that includes all maintenance, terminal, shipping, receiving, packaging, and quality employees who share an overwhelming community of interest. The maintenance, terminal, and quality employees clearly share a community of interest with the packaging, receiving, and shipping employees as to mandate their inclusion in any appropriate bargaining unit. Even if the standards articulated in *Specialty Healthcare* are used, it is clear that the employees of the single integrated process at issue in this case have an overwhelming community of interest. It would create bad law and policy to conclude otherwise in the circumstances of this case. There is no legitimate reason to exclude any of the maintenance, terminal, or quality employees and any exclusion would be arbitrary – resulting in an inappropriate, fractured unit. The unit sought by the Employer is the only appropriate unit and the Regional Director should so conclude.

C. The Production Leads, Packaging Lead, and Lab Tech 3 Are Not Supervisors Under the Act and Therefore Should be Included in the Bargaining Unit

Section 2(11) of the Act states:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to address their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Under well-settled Board law, the party asserting supervisory status bears the burden of proof. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *NLRB v. Kentucky River Community Care*, 532 US 706, 711-712 (2001). In addition, any lack of evidence is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities, Inc.*, 329

NLRB 535, 536 fn. 8 (1999). The Board has frequently cautioned against finding supervisory authority based only on infrequent instances of its existence. *Family Healthcare, Inc.*, 354 NLRB 254 (2009) (overruled on other grounds); *Golden Crest Healthcare*, 348 NLRB 727, 730 fn. 9 (2006). As such, "the exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status on an employee." *Somerset Welding & Steel, Inc.*, 291 NLRB 913 (1988), *quoting Feralloy West Co.*, 277 NLRB 1083, 1084 (1985).

The record is wholly devoid of any evidence that the production leads, packaging lead (hereinafter referred to collectively as "the leads"), or Lab Tech 3 exercise any supervisory authority. The Union utterly failed to establish any evidence that the leads or Lab Tech 3 have any authority to hire, fire, transfer, suspend, lay off, recall, promote, discharge, or discipline employees. At most, the record contains a passing reference opining that one lead might tell employees to dump reprocessed oil and another lead might have instructed some unidentified employee to perform routine materials audits.[7]

The only other "evidence" presented by the Union was testimony by Alban who claimed to have fired an employee. On cross examination, however, he was forced to admit that at the time he claims to have fired an employee, he was not employed by the Employer nor was the temporary agency employee he claims to have discharged. Under any analysis, this cannot form the basis for finding all leads are 2(11) supervisors where there were only a few isolated

[7] Suggestions by the Union that leads "transferred" employees on two isolated occasions are also unavailing. At best, the Union's evidence showed that leads might ask an employee to fill in where needed on a temporary basis or opine to a fellow employee without decision making authority who might be a good candidate for a transfer.

incidents where the leads provided limited instruction. Such ministerial actions have repeatedly been rejected by the Board as sufficient to establish supervisory status.

In *Dole Fresh Vegetables*, 339 NLRB 785 (2003), the Board rejected an employer's contention that lead employees were supervisors under the Act. In so doing, the Board emphasized that the job title "lead" does not determine supervisory status, rather "'[t]he status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification.'" *Id.* at 785, *quoting T. K. Hardin & Sons,* 316 NLRB 510, 530 (1995). Further, the Board held that any assignments of jobs by the leads were routine in nature and that any isolated instance of directing employees "does not rise to the level of independent judgment required to find that the leads exercise statutory authority." *Id.* at 785-786. Just like the leads in *Dole Fresh Vegetables*, the leads "lead" in title only. The leads do not exercise any supervisory authority and only engage in ministerial duties at the direction of the Employer.

The Union failed to establish that the leads do anything more than occasionally ask employees to assist as or where needed, or offer non binding opinions about who should work where. This, by its very definition, is what leads do. This is wholly insufficient to establish supervisory status.

With respect to the Lab Tech 3, the Union provided absolutely no evidence that he is even engaged in the same limited activities as the packaging or shipping leads, let alone exercised any supervisory authority. The Union fell woefully short of its burden and failed to establish that the Lab Tech 3 exercises any indicia of supervisory.

The Union failed to establish any evidence that the leads or the Lab Tech 3 are supervisors under the Act. As such, the leads and the Lab Tech 3 should be included in any bargaining unit determined appropriate by the Region.

IV. CONCLUSION

Consistent with the Board authority cited above and the record evidence from the hearing, the Region should decide that the smallest appropriate unit at Cargill for the purposes of the present petition is all full-time and regular part-time maintenance, terminal, shipping, receiving, packaging, and quality employees, including the production leads, packaging lead, and Lab Tech 3.

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, LLC

DATED: August 19, 2014

By: /s/

Douglas M. Topolski, Esquire
1909 K Street, Suite 1000
Washington, DC 20006
202.263.0242 (phone)
202.887.0866 (fax)

Ruth L. Goodboe, Esquire
34977 Woodward Avenue, Suite 300
Birmingham, Michigan 48009
248.723.6143 (phone)
248.593.2603 (fax)

Attorneys for Cargill, Inc.

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the within Post-Hearing Brief has been served by electronically filing same this 19th day of August, 2014 on:

Olivia Garcia, Regional Director
National Labor Relations Board, Region 21
888 S. Figueroa St, Floor 9
Los Angeles, CA 90017-5449

Also, I do hereby certify that a true and correct copy of the within Post-Hearing Brief has been served on the following individuals by email this 19th day of August, 2014: Sylvia Meza at sylvia.meza@nlrb.gov, Robert A. Cantore, Esq. at rac@gslaw.org, and Travis S. West, Esq. at twest@gslaw.org.

By: /s/
Counsel for Cargill, Inc.

EXHIBIT 3

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

CARGILL, INC.

Employer

and

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 324

Case No. 21-RC-136849

Petitioner

EMPLOYER'S MOTION TO DISMISS THE PETITION WITH PREJUDICE

Employer, Cargill, Inc. ("Employer" or "Cargill"), through undersigned counsel, respectfully requests that the Regional Director dismiss the above-captioned petition with prejudice. Accordingly, for the reasons discussed below, Employer's Motion to Dismiss the Petition with Prejudice should be granted.

INTRODUCTION AND PROCEDURAL HISTORY

The petition in this case represents the second time within weeks that United Food & Commercial Workers International Union, Local No. 324 ("the Union") has sought an election in an inappropriate unit of a portion of the production and maintenance employees employed by Cargill at its Fullerton, California facility ("the Facility"). The first petition was properly dismissed. *See* Exhibit 1, Decision and Order (D&O) in Case 21-RC-133636 (decided September 11, 2014). This most recent petition should be dismissed as well.

The Union filed its first petition addressing the Facility on July 28, 2014 in Case No. 21-RC-133636. Exhibit 1 at 1. After changing its position several times, the Union

stated at the unit determination hearing that it would proceed only in a unit of all full time and regular part time packaging, shipping, and receiving employees. *See* Exhibit 1 at 1-2; *see also* Exhibit 2, 21-RC-133636 2014 08-12 Hearing Transcript (Tr.) at 271-72[1]. The Union contended that lead operators and employees should be excluded because they were supervisors within the meaning of Section 2(11) of the National Labor Relations Act ("the Act"). *E.g* Exhibit at 1. Cargill sought to include all lead operators and employees as well as terminal, quality, and maintenance employees. *Id.* 2-3.

Upon the record produced at a hearing lasting a full day, the Regional Director concluded in the D&O that the Union had failed to meet its burden of showing that the lead operators and employees were 2(11) supervisors. Exhibit 1. Thus, the Regional Director correctly concluded that the unit sought by the Union was not appropriate. *Id.* at 13. Since the Union expressly disclaimed interest in proceeding in any unit other than the one it demanded that excluded the lead operators and employees, the Regional Director properly dismissed the petition. *Id.* at 13-14.

The Union responded by filing a second petition in Case No. 21-RC-136849 on September 16, 2014. As explained to the Employer's counsel by the Region, the Union again seeks a unit of only all full time and regular part time employees in the packaging, shipping, and receiving departments. The Union refuses to concede that lead operators in the departments it seeks must be part of any appropriate unit as determined by the Regional Director in Case No. 21-RC-133636. Thus, the petition in this mater seeks exactly the same unit already found inappropriate in Case No. 21-RC-133636.

---

[1] Only relevant portions of the transcript of the hearing in Case No. 21-RC-133636 are included within Exhibit 2.

The Employer informed the Region of its position concerning the second petition by e-mail on September 17, 2014. The Employer correctly observed that the unit sought by the Union was inappropriate by definition because the Union refused to include the lead employees the Regional Director just days before said must be included in any appropriate unit. This alone should require dismissal. Second, the Employer correctly observed that the Union had expressly disclaimed interest in any unit except the one upon which it insisted at the hearing. Therefore, the dismissal in Case No. 21-RC-133636 should be treated as one with prejudice, barring the Union from filing any petition concerning the Facility's production and maintenance employees for 6 months.

The Region informed Employer's counsel by telephone on September 19, 2014 that it was holding in abeyance the processing of the instant matter. A written notice was issued on September 19, 2014 informing the parties of this fact and postponing indefinitely the hearing scheduled for September 26 2014.

Late in the afternoon on September 22, 2014, Counsel for Employer was informed by telephone that the Region had decided to resume processing the petition in this matter. The Region inquired as to whether Employer would be available for a hearing on October 2, 2014. The Region stated that efforts to obtain a stipulation would be pursued once the time for filing a Request for Review in Case No. 21-RC-133636 expired. Counsel for the Employer replied by stating that Employer had not changed its position that the petition in this matter should be dismissed. Employer was informed by e-mail on September 23, 2014 that notwithstanding uncertainty about whether Employer's witnesses might be available, a hearing has been scheduled in this matter for October 2, 2014. This Motion follows.

ARGUMENT

As stated above, the Union was given every opportunity at the hearing held on August 12, 2014 in Case No. 21-RC-133636 to present and change its positions concerning unit determinations at the Facility. Indeed, it was given a recess near the close of the hearing for the sole purpose of reconsidering whether it would proceed in any unit other than one it defined on the record. Exhibit 2, Tr. 271-72. After being given all the time it wanted to define its position, and after being given every opportunity to present all the evidence it wanted to introduce, the Union clearly stated its conclusion. When asked after the recess if it wanted to change its position that it would proceed to an election only in a unit of packaging, shipping, and receiving employees without lead operators and employees (*see* Exhibit 2, Tr. at 270), the Union said simply "No." Exhibit 2, Tr. at 272. Given these irrefutable circumstances, the National Labor Relations Board's ("the Board") Rules and Regulations, well established legal principles, and the Casehandling Manual all require dismissal of this petition with prejudice.

First, the Board's Rules and Regulations make clear that the unit determinations made by the Regional Director after consideration of a hearing record are "final." 29 CFR § 102.67(b). The only way to challenge these determinations is to file a Request for Review with the Board. *Id.* Even then, the grounds for review are very narrow. 29 CFR § 102.67(c). They do not include permitting a petitioner to change a position taken at the hearing solely because the party does not like the outcome that its position produced. They certainly do not permit allowing a petitioner to ignore the procedures requiring a request for review altogether by filing a new petition seeking to re-litigate the same issues in the same unit at the same facility while the first petition is still pending.

Second, any effort by the Union to change the position it took at the hearing in Case No. 21-RC-122636 would by definition require a re-opening and then reconsideration of the record. The Rules and Regulations do not permit the Union to do this in the circumstances created by the two petitions it has filed. A request to re-open the record after the close of the hearing, or a motion for reconsideration or for a rehearing for that matter, requires "extraordinary circumstances." 29 CFR § 102.65 (e)(1). Specifically excluded from such grounds is raising any issue that could have been raised but was not raised under any other section of the Rules. *Id.* Indeed, a request to re-open the record or for a rehearing requires specification of the error alleged, the prejudice to the movant caused by this error, what new evidence is to be produced, why it was not available at the hearing, and how it would change the result. *Id.* A motion for reconsideration requires the identification of a material error with particularity and page number of the record. Of course, these requests must be made in the proceeding where the record was created, *i.e.* Case No. 21- RC-133636. *Id.*

The Union cannot hope to even pretend that any "extraordinary circumstances" exist in Case No. 21-RC-133636 that would justify re-opening the record, conducting a rehearing, or pursuing re-consideration of the determinations in that case. To the contrary, the record makes clear that the Union was given a recess at the hearing for the express purpose of reconsidering its position as to whether and to what extent t would proceed with an election in any unit other than the portion the integrated production and maintenance unit it sought. If it wanted to change its position on which units it finds acceptable, it should have done so when given the opportunity in Case No. 21-RC-133636. Again, the Union cannot avoid consequences of its actions and decisions or the required procedures

required to challenge these consequences merely by completely ignoring them in favor of starting a new proceeding for sole purpose of re-litigating issues that have been decided already.

Third, the Board has been consistent in its view that parties should not be allowed to litigate issues in an untimely or piecemeal fashion. *E.g.* 29 CFR § 102.65(e)(1)(no motion for reconsideration, rehearing or to re-open the record shall be considered by the Regional Director with respect to any matter that could have but was not raised pursuant any section of the Board's Rules); and *cf. Jefferson Chemical Co., Inc.,* 234 NLRB 992 (1972)(Board will not condone piecemeal litigation of ULP claims); *Peyton Packing Co., Inc.,* 129 NLRB 1358 (1961)(same). The Union's petition in this matter violates both of these principles.

The Union had every opportunity to change its position as to what units it would accept before and during the hearing in Case. No. 21-RC-133636. The Regional Director issued her decision based upon the evidence in the record and the Union's stated position as to whether and to what extent it would proceed to an election based upon determinations made on that record. Exhibit 1. The Union has procedures available to it to challenge the Regional Director's determinations based upon the record and the positions asserted by the Union. Whether the instant petition is considered an effort to re-litigate the same issues already decided in Case No. 12-RC-133636, or a piecemeal effort to offer a new position in a new proceeding as to the same unit at the same facility that was addressed in Case 21-RC-133636 that could have and should have been made in the first case, it is clear that the Union's petition in this case is improper and should be dismissed.

Finally, the Casehandling Manual makes clear that the instant petition should be dismissed regardless of how the Union attempts to define it. To the extent the Union seeks the same unit it sought in Case No. 21-RC-133636, this unit has already been found inappropriate and the petition should be dismissed for this reason alone. Casehandling Manual Part Two Representation Proceedings (CHM) § 11011. To the extent the Union purports to change its position in this case and seek a different portion of the unit at issue in Case No. 21-RC-133636, it cannot do so without first accepting the dismissal of the petition in Case No. 21-RC-133636, requesting review of the decision in that case, or seeking withdrawal of the petition. Accepting dismissal, or any withdrawal to the extent such an option is even available at this stage, must come with prejudice and with a six month bar to filing a new petition. *E.g.* CHM § 11112.1(a).

In the final analysis, nothing allows a petitioner to file a completely new petition while a petition filed by the same petitioner addressing the same issues in the same unit at the same employer facility is pending. This is particularly true when, as in this matter, the sole reasons for filing the second petition are to avoid the determinations made in the first proceeding that the petitioner does not like while providing the petitioner the chance to re-litigate issues that have already been decided, or raise issues that should have been raised or can still be raised, in the first and pending proceeding. One need only state this position to demonstrate its complete lack of merit. To let this matter proceed any further would violate the requirements of the Board's Rules and Regulations, violate well-established Board principles prohibiting raising issues in an untimely and/or piecemeal fashion, and violate the provisions of the CMH. Indeed, declining to dismiss this petition is nothing

short of a denial of due process. For these and all the reasons set out above, this petition should be dismissed immediately and with prejudice without further proceedings.

CONCLUSION

For the reasons set forth above, Employer's Motion to Dismiss the Petition with Prejudice should be granted. The petition should be dismissed with prejudice and Petitioner should not be permitted to file a petition for any election in a production and maintenance unit at Employer's Fullerton, California facility for a period of six months from the date of the Order dismissing this petition.

Respectfully submitted,

Douglas M. Topolski, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1909 K. Street, N.W., Suite 1000
Washington, DC 20006
(202) 263-0242

Ruthie L. Goodboe, Esq.
Sarah M. Rain, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
34977 Woodward Avenue, Suite 300
Birmingham, MI 48009
(248) 593-6400

Attorneys for Cargill, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of September, 2014 the foregoing Motion to Dismiss with Prejudice was filed electronically and that service copies were sent by federal express and electronic mail to:

United Food & Commercial Workers
International Union, Local 324
8530 Stanton Ave
Buena Park, CA 90620

Robert A. Cantore, Esq.
Gilbert & Sackman
3699 Wilshire Blvd Suite 1200
Los Angeles, CA 90010
rac@gslaw.org

William M. Pate, Acting Regional Director
National Labor Relations Board, Region 21
888 S. Figueroa Street, 9th Floor
Los Angeles, California 90017
William.pate@nlrb.gov

Sylvia Meza, Field Examiner
National Labor Relations Board, Region 21
888 S. Figueroa Street, 9th Floor
Los Angeles, California 90017
Sylvia.Meza@nlrb.gov

Douglas M. Topolski

Exhibit 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

CARGILL, INC.[1] Employer and **UNITED FOOD & COMMERCIAL WORKERS UNION LOCAL NO. 324**[2] Petitioner	Case 21-RC-133636

DECISION AND ORDER

United Food & Commercial Workers Union Local No. 324 (Petitioner) filed the instant petition on July 28, 2014, seeking to represent all full-time and regular part-time packaging, shipping, and receiving employees employed by the Employer at its facility located at 566 North Gilbert Street, Fullerton, California for collective-bargaining purposes; excluding all other employees, packaging leads, shipping leads, office clerical employees, professional employees, staffing agency employees, guards and supervisors as defined in the National Labor Relations Act.[3]

The Employer contends that the petitioned-for unit is not an appropriate unit because it does not include the maintenance, terminal, and quality-control employees, who share a

[1] The Employer's name appears as amended at the hearing.
[2] The Petitioner's name appears as amended at the hearing.
[3] The Petitioner amended the unit description at the hearing.

community of interest with the petitioned-for employees. In addition, the Employer contends that the packaging and shipping leads are not supervisors as defined in the Act, and should also be included in the unit.

On August 12, 2014, a hearing in this matter was held before a hearing officer of the National Labor Relations Board (the Board), and the parties thereafter filed briefs. Pursuant to the provisions of Section 3(b) of the National Labor Relations Act (the Act), the Board has delegated its authority in this proceeding to me.

I. THE ISSUES AND SUMMARY

The issues are:

1. Whether the packaging, shipping, and receiving employees share an overwhelming community of interest with the maintenance, terminal, and quality-control employees, so as to be included in a single unit for purposes of collective bargaining.
2. Whether the packaging leads (Jaime Sedano and Rafael Rodriguez), the shipping lead (Raymond Ramirez), and a quality-control employee (Steve Lim), are supervisors under the Act. The Petitioner contends that they are supervisors as defined by Section 2(11) of the Act. The Employer contends that they are employees as defined in the Act, and should be included in the unit.

Based on the record in its entirety, I find that the packaging and shipping leads are not supervisors as defined in the Act, and should be included in any appropriate unit. Thus, I find that the petitioned-for unit is not an appropriate unit because it excludes the packaging and shipping leads. At the hearing, the Petitioner stated that it does not wish to proceed to an

election in any alternate unit if the unit sought by the Petitioner is deemed to be inappropriate. Therefore, I hereby dismiss the petition.[4]

FACTUAL BACKGROUND

A. Overview of the Employer's Operation

The Employer is engaged in the business of operating an oil processing facility in Fullerton, California.[5] Oil arrives at the facility in bulk via railcars or trucks. It is then stored, tested in a lab at the facility, certain oils are blended, and oil ultimately get packaged and shipped to customers. A total of 51 employees (including 3 leads) work in the following departments: terminal, quality-control, maintenance, packaging, shipping, and receiving.[6]

Terminal employees unload the oil from railcars or trucks, and transfer it to the appropriate tanks. The quality-control department (also known as the lab) is in charge of testing the oil each time it gets moved within the facility and after it gets blended. This department has four lab technicians who perform the analysis to test the oil. Various employees, including terminal employees, leads, and certain packaging employees, drop off oil samples at the lab for testing. The maintenance department currently consists of four mechanics responsible for repairing equipment in the facility, including equipment used by machine operators in the packaging department.

---

[4] Since the Petitioner does not wish to proceed to an election in any alternate unit, it is not necessary to rule on the issues of: (1) whether the packaging, shipping, and receiving employees share an overwhelming community of interest with the maintenance, terminal, and quality-control employees; and (2) whether Steve Lim, a quality-control employee, is a supervisor as defined in the Act.

[5] The parties agreed to a commerce stipulation: the Employer, a Delaware corporation, with a facility located at Fullerton, California, is engaged in the business of operating an oil processing facility. During the past 12 months, a representative period, the Employer, purchased and received goods valued in excess of $50,000 which goods were shipped directly to the Employer's Fullerton, California facility from points located outside the State of California.

[6] Eight employees work in the terminal, 4 in quality-control, 4 in maintenance, 23 in packaging, 9 in shipping, and 3 in receiving.

Packaging-department employees perform various tasks. There, employees operate one of four lines: one where oil is packed into 35 lb. jugs in a cardboard boxes; one where it gets packed as a 50 lb. cube; one where oil gets packed into 5-quart bottles; and a so-called OLE line where oil get packed in different types of smaller bottles. Among the packaging employees, some work as relievers, votator operators, filler operators, or depalletizers. Relievers are responsible for filling in and relieving anyone in the lines, votator operators operate a particular machine that adjusts the viscosity of the oil, filler operators operate the machines in the line, and depalletizers remove boxes from pallets. Other packaging employees use forklifts to move the packaged oil to a warehouse area.

Thereafter, the oil gets shipped out by employees in the shipping department. Shipping employees either load trucks with finished product or perform clerical work related to shipping.

The receiving department handles the purchase and receipt of raw materials. The purchaser coordinates the purchase of raw materials while the other receiving employees operate forklifts to unload and store the material at the facility.

Stephanie Puig ("Puig") is the supervisor of the terminal, packaging, shipping, and receiving departments. In those departments, Puig is responsible for issuing any necessary discipline. She is also involved in hiring for those departments. Employees go to her to request time off, and she approves vacation requests. She is also responsible for conducting performance appraisals for those employees.

B. Packaging Leads Jaime Sedano and Rafael Rodriguez[7]

There are two leads in the packaging department; Jaime Sedano ("Sedano"), first-shift lead, and Rafael Rodriguez ("Rodriguez"), the second-shift lead. Their duties are to monitor the

[7] Neither of these two leads testified at the hearing.

schedule for the lines in packaging. The record evidence is not clear as to what "monitoring" the packaging lines entails. The packaging leads also take oil samples to the lab. In addition, they monitor orders in the computer system and perform other computer functions. They can operate the machines in the packaging area.

1. Jaime Sedano

a. Transfer / Recommendation to transfer

The Petitioner presented Carlos Hernandez ("Hernandez"), a receiving-department employee, as a witness at the hearing. According to Hernandez, Sedano transferred him from the packaging department to receiving department about three months ago. In this regard, Hernandez testified that Sedano told him to "go and help at receiving" and left him there. Hernandez admitted that he does not know whether Sedano received instructions from someone else to transfer him. Hernandez testified that Sedano simply told him to "go help" in receiving.

At the hearing, the Petitioner also presented employee Carlos Alban ("Alban"), who testified that Sedano told him that Sedano was going to recommend him for his current position as purchaser in the receiving department. The record is not clear as to when this conversation took place.[8] According to Alban, Sedano was the purchaser before Sedano was promoted to be a lead. Alban testified that Sedano trained Alban for two weeks for the purchaser job sometime before the official announcement was made that Sedano was going to become the packaging lead. Alban further testified that Sedano told him, "You know what, I will put my word, you know, for you to be the purchaser."

At the hearing, Alban also stated that he submitted an application for this job, and that he was interviewed by Plant Manager Jesus Valadez, Project Engineer Linsay Farrell, and

[8] Alban has worked as a purchaser for about 7 months. Presumably, the conversation happened around that time. Prior to becoming a purchaser, Alban worked in another area at the facility.

Sedano. On cross-examination, Alban admitted that he does not know what weight was given to Sedano's recommendation in the decision to move him to his current position.[9]

b. Assignment of overtime

Employee Israel Ramirez testified that Sedano has sometimes told him that he has to come in on Saturday to work overtime, but that most of the time the Employer asks for volunteers to work overtime. On rebuttal, Puig testified that the overtime schedule is made by Kelli Stiver, the production scheduler. If production is running behind, Stiver consults with Puig to determine whether overtime is necessary to catch up. The Employer tries to give employees advance notice of overtime. However, when enough notice cannot be provided, the Employer will solicit volunteers. According to Puig, Sedano's only role in this process is to write down the names of those who volunteer, and submit them to her for approval of payroll.

c. Assignment of work

The only evidence of Sedano's involvement in the assignment of work was adduced by certain questions asked by the hearing officer during Puig's testimony. Puig testified that packaging leads have assigned other workers to do certain specific task such as to go dump reprocessed oil.

2. Rafael Rodriguez

As noted above, Puig testified that packaging leads (Sedano and Rodriguez) may assign employees to go dump reprocessed oil. There is no other evidence in the record specifically pertaining to Rodriguez's duties as a lead.

[9] Puig, who was not working at the facility during the time that Alban was hired as the purchaser, testified that she does not know who approved his transfer.

C. Shipping Lead Raymond Ramirez[10]

The shipping department has one lead, Raymond Ramirez ("Ramirez"). All employees in that department work the first shift. There are a few hours during the shift when Puig is not onsite, and shipping lead Ramirez monitors the operation of the department. The record contains limited evidence detailing what Ramirez does to monitor the department. This evidence primarily comes from Puig's testimony. For example, on cross-examination, Puig testified that if a fight breaks out among shipping employees when she is away, the shipping lead will call her. She will then decide whether anyone should be sent home.

During examination by the hearing officer, Puig testified that Ramirez has assigned others to do inventory checks. Inventory is routinely checked once the end of each month for accounting purposes, but Ramirez can assign someone to do an inventory check at other times if needed. Puig further testified that Ramirez can also assign employees to move product from one area of the warehouse to another. According to Puig, Ramirez spends much of his time on what the Employer calls "Idoc failures," which means correcting computer-system communication failures. There is no other evidence in the record describing Ramirez's duties.

D. Other Evidence Related to the Supervisory Status of Leads.

Employee Alban testified that he was initially hired to work at the Employer's facility as lead-temporary worker through a staffing agency two years ago. Alban testified that when he was a lead, he fired a worker "on the spot." The record does not indicate precisely when this happened. The worker that he fired was a temporary employee who got into a fight with another temporary worker. No further details of this incident were provided at the hearing.

[10] Raymond Ramirez did not testify at the hearing.

Alban also testified that when he worked as a lead, he was not referred to as a "Supervisor One." He claims that he first heard this phrase from a manager named Mike Mattingly[11] about two weeks prior to the hearing in this case. According to Alban, he and Mattingly were discussing the Union when Mattingly mentioned that the leads were considered level-one supervisors. No other employee testified that leads are known as "level-one supervisors," and no employees testified that they view their leads as supervisors.

ANALYSIS

A. Section 2(11) Supervisor Legal Frame Work

The Petitioner asserts that the packaging and shipping leads are statutory supervisors as defined by Section 2(11) of the Act. The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). Section 2(11) of the Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment.

Under Board and Supreme Court precedent, in order to be a statutory supervisor, an individual must have the authority to effectuate or effectively recommend at least one of the supervisory indicia enumerated in Section 2(11) of the Act, using independent judgment in the interest of the employer. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001)).

[11] The record is not clear as to who is Mike Mattingly. He was described by Alban as the plant manager's boss.

Supervisory status must be established by a preponderance of the evidence. *Oakwood Healthcare, Inc.*, supra at 694. Lack of evidence is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). "[W]henever the evidence is in conflict or otherwise inconclusive on particular indicia or supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Further, job descriptions and job titles are only paper authority and are not given any controlling weight by the Board. *Avante at Wilson, Inc.*, id.; *Training School at Vineland*, 332 NLRB 1412, 1416 (2000).

In the instant case, the Petitioner has failed to meet its burden in establishing the supervisory status of the packaging and shipping leads. None of the packaging and shipping leads were presented at the hearing to testify with respect to their day-to-day duties. Only three employee witnesses testified regarding the duties of the leads to whom they allegedly report, but their testimony lacked detail. The record in general is devoid of detailed evidence as to the responsibilities and duties of the leads. Instead the Petitioner relied largely on general conclusionary statements made by the employee witnesses, and limited testimonial evidence adduced by the Petitioner during Puig's cross-examination.

The Petitioner claims that the leads are referred to by the Employer as level-one supervisors. But, the only evidence presented to support this claim was Alban's testimony that Manager Mike Mattingly made a comment to that effect. This evidence is insufficient to prove

this allegation. Although the Petitioner presented four employee witnesses, none of them testified that the leads are known as level-one supervisors or that they view their leads as supervisors. Moreover, as the Petitioner correctly noted in its brief, supervisory status is determined by an individual's duties, not by his job title or classification. As discussed below, the record evidence regarding the leads' duties failed to establish that the leads are supervisors.

B. Packaging Lead Jaime Sedano

The Petitioner contends that the packaging leads are supervisors because they can assign employees to perform specific duties, assign employees to specific departments, and assign overtime.

However, the only evidence presented regarding the packaging leads' involvement in the assignment of work was through Puig's testimony when she stated that packaging leads can ask employees to go "dump reprocessed oil." No specific examples or direct evidence of work assignments by the packaging leads were presented. Without other evidence, the act of simply asking employees to dump oil does not rise to the level of independent judgment necessary to establish that the leads exercise the requisite statutory authority to assign or direct. Accordingly, the record evidence is insufficient to establish these indicia.

As to the alleged assignment of employees to specific departments, employee Hernandez testified that Sedano transferred him from the packaging department to the receiving department. But, the only other detail provided about Sedano's involvement in this transfer was that Sedano told Hernandez to "go help out in receiving." Hernandez admitted that he did not know whether Sedano was following instructions from someone above him. The record evidence does not establish who made the decision to transfer Hernandez, nor does it fully describe the extent of

Sedano's role in the transfer. Accordingly, this evidence is insufficient to show that Sedano and the other leads have authority to transfer or reassign workers to different departments.

The Petitioner also claims that leads can effectively make hiring recommendations. In this regard, employee Alban testified that before it was officially announced that Sedano was going to become a lead, Sedano trained Alban for the position of purchaser, a position held by Sedano before he became a lead. Alban testified that Sedano told him, "I will put my word, you know, for you to be the purchaser." It is not clear on the record whether Sedano made this statement before or after he became a lead. Alban admitted that he submitted an application for the purchaser position, and that he was interviewed by the plant manager along with a project engineer and Sedano. However, the record lacks any details regarding the alleged interview or the extent of Sedano's participation in it. Accordingly, without context and explanation, I cannot find that Sedano effectively made a hiring recommendation. [12]

Likewise, there is insufficient evidence to conclude that leads have authority to assign overtime. The only evidence presented in support of this claim is employee Israel Ramirez's testimony that Sedano has sometimes told him that he has to come in on Saturdays, but that now the Employer seeks volunteers most of the time. The Petitioner did not present any further details regarding the assignment of overtime. On rebuttal, Puig testified that the lead's role in scheduling overtime is to solicit and write down the names of employees who volunteer for overtime. Thus, the record evidence failed to establish that leads assign overtime. Where there is

[12] Nor can I conclude that the leads have authority to discharge employees as contended by the Petitioner. Although employee Alban testified that he fired a temporary employee when he was a lead sometime around one or two years ago, Alban provided very limited details of this event. Even if Alban exercised independent authority to discharge an employee, that would be insufficient to establish that the current leads at issue in this case (Sedano, Rodriguez, and Ramirez) have the authority to discharge.

inconclusive evidence, the party asserting supervisory status has failed to meet its burden. *Dean & Deluca New York, Inc.*, 338 NLRB at 1048.

The Petitioner did not present other evidence of Sedano's supervisor authority. Therefore I find that Petitioner failed to meet its burden to prove that Sedano is a supervisor as defined in Section 2(11) of the Act.

C. Packaging Lead Rafael Rodriguez

The only record evidence regarding the duties of packaging lead Rodriguez was testimony by Puig stating that packaging employees (Sedano and Rodriguez) can assign employees to go "dump reprocessed oil." For the reasons discussed above, this evidence is insufficient to establish that the packaging leads are statutory supervisors. Therefore, I find that the Petitioner failed to meet its burden to prove that Rodriguez is a supervisor as defined in Section 2(11) of the Act.

D. Shipping Lead Raymond Ramirez

The Petitioner suggests that leads are supervisors because they monitor the operations of their department and are accountable for their performance when Puig is away from the plant. Puig admitted that she is away from the facility during a portion of the shipping department's shift, and acknowledged that the shipping lead (Ramirez) monitors the department during this time. However, no evidence was produced by the Petitioner to explain what Ramirez does to "monitor" the department.

The only other evidence that was presented regarding Ramirez's duties was Puig's testimony that Ramirez can assign employees to do inventory checks or to move product from one part of the warehouse to another. This limited evidence suggests that these assignments are merely routine and ministerial. Thus, the evidence is insufficient to show that Ramirez exercised

any supervisory authority. Therefore, I find that the Petitioner failed to meet its burden to prove that shipping lead Ramirez is a Section 2(11) supervisor as defined in the Act.

CONCLUSION

Based on the entire record in this matter and in accordance with the discussion above, I find and conclude that:

1. The hearing officers' rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner did not meet its burden of establishing that the packaging and shipping leads are supervisors as defined in Section 2(11) of the Act. Therefore, the petitioned-for unit is inappropriate because it excludes the packaging and shipping leads.

5. Since the Petitioner does not wish to proceed to an election in any alternate unit if the petitioned-for unit was deemed to be inappropriate, I hereby dismiss the Petition.

ORDER

IT IS HEREBY ORDERED that the Petition in this matter, be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by September 25, 2014. The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov,[13] but may not be filed by facsimile.

DATED at Los Angeles, California, this 11th day of September, 2014.

Olivia Garcia
Regional Director, Region 21
National Labor Relations Board

[13] To file the request for review electronically go to www.nlrb.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlrb.gov.

Exhibit 2

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 21

In the Matter of:

Cargill, Inc., Case No. 21-RC-133636

Employer,

and

United Food & Commercial
Workers Union Local No. 324,

Petitioner.

Place: Los Angeles, California

Dates: August 12, 2014

Pages: 1 through 274

Volume: 1

OFFICIAL REPORTERS

AVTranz
E-Reporting and E-Transcription
845 North 3rd Avenue
Phoenix, AZ 85003
(602) 263-0885

leads and that Steve Lim are supervisors under the Act and maintains that they are employees under the Act.

Can the parties briefly restate their positions regarding the outstanding issues for the record? And whoever wants to go first.

MR. CANTORE: I will repeat the position that --

HEARING OFFICER MEZA: Okay.

MR. CANTORE: -- the leads are supervisors, that the packaging, shipping and receiving is an appropriate unit. And we also do not believe that one additional employee, Kimberly Cruz, is in the packaging unit even though she's listed here. She works in engineering, works on the other side of the tracks and I don't know why she's in packaging.

HEARING OFFICER MEZA: Okay. Wait. So are you raising a whole new issue at this time?

MR. CANTORE: I am saying we're going to challenge her when she votes.

HEARING OFFICER MEZA: Okay.

MR. CANTORE: Nothing more than that.

HEARING OFFICER MEZA: Okay. That's all you're saying?

MR. CANTORE: Yes.

HEARING OFFICER MEZA: Okay. All right. Okay. Anything else? Okay. Mr. Topolski?

MR. TOPOLSKI: Our -- our position hasn't changed since the beginning of the hearing. I believe that the Union -- that the

HEARING OFFICER MEZA: Off the record then?

MR. CANTORE: -- we want to go forward in another unit, and now he's having second thoughts. So why don't we --

HEARING OFFICER MEZA: Do we need to go off the record?

MR. CANTORE: We need to go off the record --

HEARING OFFICER MEZA: Okay.

MR. CANTORE: -- for a minute.

HEARING OFFICER MEZA: Off the record.

MR. CANTORE: That's fine.

(Off the record at 3:46 p.m.)

HEARING OFFICER MEZA: Okay. On the record.

Okay. So, Mr. Cantore, you were just discussing off the record whether you wanted to change your --

MR. CANTORE: I would not.

HEARING OFFICER MEZA: -- position on accepting an alternate unit. Okay. So, no?

MR. CANTORE: No.

HEARING OFFICER MEZA: Your answer's still the same? Okay. All right. Let's see here. Okay. So I think the last question was whether there's anything further the parties desire to present.

MR. CANTORE: And the answer's no.

MR. TOPOLSKI: The answer's no.

HEARING OFFICER MEZA: Okay. So both parties stated no.

And do the parties wish to waive the filing of briefs?

MR. CANTORE: No.

MR. TOPOLSKI: No.

HEARING OFFICER MEZA: Okay. And the briefs will be due -- briefs will be due on August 19th, 2014. And that's seven days from today, correct? All right.

Okay. Mr. Topolski, have all exhibits been offered?

MR. TOPOLSKI: Yes.

HEARING OFFICER MEZA: Okay. And, Mr. Cantore, have all exhibits --

MR. TOPOLSKI: Let's check the record.

HEARING OFFICER MEZA: -- been offered?

MR. TOPOLSKI: Exhibits 1 and 2 is all I have. I believe they've been offered and introduced, correct? Were they?

HEARING OFFICER MEZA: Yes. Okay.

MR. CANTORE: And all of mine, two exhibits?

HEARING OFFICER MEZA: Okay. So both Employer's Exhibit 1 and 2 have been received and Petitioner's Exhibit 1 and 2 have been received into the record. Okay. So if there is nothing further, the hearing will be closed.

MR. TOPOLSKI: Yeah.

MR. CANTORE: Yeah.

HEARING OFFICER MEZA: Hearing no response, the hearing is now closed.

(Whereupon, the hearing in the above-entitled matter was closed at 3:54 p.m.)

Exhibit 12

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

In the Matter of:

CARGILL, INC.,

Employer,

and **Case No. 21-RC-136849**

UNITED FOOD & COMMERCIAL WORKERS UNION LOCAL NO. 324,

Petitioner.

EMPLOYER'S MOTION TO STRIKE PETITIONER'S POST-HEARING BRIEF, OR IN THE ALTERNATIVE, TO STRIKE THE PETITION IN ITS ENTIRETY

Employer Cargill, Inc. ("Cargill"), through undersigned counsel, respectfully moves for an Order striking the Petitioner's Post-Hearing Brief or, in the alternative, striking the portions of the Post-Hearing Brief that attempt to improperly argue the supervisory status of lead employees where such arguments were expressly prohibited by the Petitioner's refusal to state a clear position on the record, or alternatively for an Order dismissing the Petition with Prejudice. The grounds for this Motion are as follows:

1. At the hearing on this matter, the Petitioner appeared to refuse to take a position on the issue of whether lead employees are supervisors under Section 2(11) of the National Labor Relations Act (the "Act"). Hearing Officer Ms. Sylvia Meza specifically asked the Petitioner for its position on the supervisory status of lead employees and the Petitioner failed to state a clear position. (Tr. 13).[1]

[1] References to the transcript herein (Tr. __) refer to the transcript of the representational hearing held on October 2, 2014.

2. The Hearing Officer appropriately warned the Petitioner that a failure to state a position on a particular issue precludes the party from presenting evidence on the issue. (Tr. 10-11).

3. Notwithstanding the Hearing Officer's warning, the Petitioner continued to take conflicting positions on the record. *See* Tr. 10-13 and 20-21. The Petitioner refused to concede that the lead employees were not supervisors as found by the Regional Director in direct contravention of the Decision and Order in Case No. 21-RC-133636. Instead, the Petitioner stated that the leads were supervisors or that the issue needed to be decided. *Id.*

4. The Hearing Officer's warning that the Petitioner's failure to state a clear position on the record precludes the introduction of evidence on the issue is in accordance with well-established National Labor Relations Board (the "Board") principles. As the Board noted in *Bennett Industries*, 313 NLRB 1363, 1363 (1994):

> The Board's duty to ensure due process for the parties in the conduct of the Board proceedings requires that the Board provide parties with the opportunity to present evidence and advance arguments concerning relevant issues. However, the Board also has an affirmative duty to protect the integrity of the Board's processes against unwarranted burdening of the record and unnecessary delay. Thus, while the hearing is to ensure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case (NLRB Statement of Procedure Sec. 101.20(c)), hearings are intended to afford parties "full opportunity to present their respective *positions* and to produce the significant facts in support of their contentions." A party's refusal to take a position at a hearing while attempting to introduce evidence may in some circumstances signify a lack of good faith.

(Emphasis added).

5. To the extent the Petitioner continues to assert that the leads at issue either should or should not be in the unit depending upon a independent review of that issue by the Regional Director in this case, then this failure to take a position on the issue precludes the Petitioner from making any arguments addressing the supervisory status of the leads. Therefore, the Petitioner's Brief should be struck for this reason alone, or those portions addressing the issue of whether leads are supervisors should be struck.

6. To the extent the Petitioner says it does take a position on the supervisory status of the leads and that the leads at issue are statutory supervisors (*see e.g.* Tr. 13), then Petitioner concedes beyond any debate that it seeks exactly the same unit the Regional Director found inappropriate in Case No. 21-RC-133636. For all the reasons already brought to the attention of the Region and incorporated herein by reference, the Petitioner cannot be permitted to simply ignore the proceedings of Case No. 21-RC-133636 and re-litigate issues it could have and should brought in Case No. 21-RC-133636. Thus, and alternatively, the Petition should be dismissed immediately with prejudice so as to preclude Petitioner from seeking the same or a similar unit as that sought in Case No. 21-RC-133636 for a period of six months from the date of the order dismissing the Petition.

WHEREFORE, for all the reasons stated above, and for all of those reasons previously brought to the attention of the Region, the Petitioner's Brief should be struck or the Petition should be dismissed immediately and with prejudice.

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, LLC

DATED: October 13, 2014

By: /s/

Douglas M. Topolski, Esquire
1909 K Street, Suite 1000
Washington, DC 20006
202.263.0242 (phone)
202.887.0866 (fax)

Ruth L. Goodboe, Esquire
34977 Woodward Avenue, Suite 300
Birmingham, Michigan 48009
248.723.6143 (phone)
248.593.2603 (fax)

Attorneys for Cargill, Inc.

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the within Employer's Motion to Strike Petitioner's Post-Hearing Brief, or in the Alternative, to Strike the Petition in Its Entirety has been served by electronically filing same this 13th day of October, 2104 on:

Olivia Garcia, Regional Director
National Labor Relations Board, Region 21
888 S. Figueroa Street, Floor 9
Los Angeles, CA 90027-5449

Also, I do hereby certify that a true and correct copy of the within Employer's Motion to Strike Petitioner's Post-Hearing Brief, or in the Alternative, to Strike the Petition in Its Entirety has been served on the following individuals by email this 13th day of October, 2014: Sylvia Meza at sylvia.meza@nlrb.gov; Robert A. Cantore, Esq. at rac@gslaw.org; and Travis S. West, Esq. at twest@gslaw.org.

By: /s/
Counsel for Cargill, Inc.

Exhibit 13

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cargill, Inc.	
and	**Case No.: 21-RC-136849**
United Food & Commercial Workers International Union, Local No. 324	

REQUEST FOR SPECIAL PERMISSION TO APPEAL RULING OF THE REGIONAL DIRECTOR DENYING EMPLOYER'S MOTION TO DISMISS THE PETITION WITH PREJUDICE

Employer Cargill, Inc. ("Cargill"), through undersigned counsel, requests special permission to appeal the ruling of the Regional Director denying Cargill's Motion to Dismiss the Petition with Prejudice. The basis for Cargill's request for special permission to appeal is set forth below as follows:

1. This case involves a representation petition filed by the United Food & Commercial Workers International Union, Local No. 324 ("the Union"), seeking to represent a portion of the production and maintenance employees employed by Cargill at its Fullerton, California facility.

2. The Union previously filed a petition on July 28, 2014 in Case No. 21-RC-133636 seeking to represent an identical unit of Cargill's employees.

3. On August 12, 2014, the parties both fully participated in a representation hearing in Case No. 21-RC-133636.

4. On September 11, 2014, the Regional Director issued her Decision and Order finding the unit sought by the Union inappropriate. Based on the Union's statements at the hearing that it did not wish to proceed to election on any unit other than the one it sought, the Regional Director dismissed the petition in Case No. 21-RC-133636.

5. The deadline for filing a Request for Review of this Decision and Order was September 25, 2014. The Union chose not to file such a request.

6. Instead, on September 16, 2014, the Union filed the petition in this matter seeking to represent a unit of employees at Cargill's Fullerton facility identical to the unit the Regional Director determined was inappropriate in Case No. 21-RC-133636.

7. By denying Cargill's Motion to Dismiss the Petition with Prejudice, the Regional Director ignored the Board's well-established prohibition against litigating issues in an untimely or piecemeal fashion. The Regional Director is, in effect, allowing the Union to seek a re-opening, a reconsideration and/or review of the record in Case 21-RC-133636 by permitting the Union to intentionally circumvent the Board's established procedures for requesting such review set out in its Rules and Regulations. The Regional Director is also allowing the Union to avoid the six-month filing bar created by the prejudice period that should be applicable to the dismissal of the petition in Case No. 21-RC-133636. Since the Union, as late as last evening, has refused and continues to refuse to accept the Regional Director's finding that lead employees must be included in any appropriate unit at the Fullerton facility, it by definition admits that the petition

seeks an inappropriate unit. Thus, the petition in this matter should be dismissed prior to any election agreement or hearing. Further, the Union should be barred from filing a new petition seeking any unit at the Fullerton facility for a period of six months from the filing of this petition. An immediate appeal is required because the Board has a profound interest in protecting its procedures and the rights of parties who appear before it to rely upon them. Waiting will compromise this interest irreparably by presenting the Board with a *fait accompli.*

WHEREFORE, Cargill respectfully requests that the Regional Director and the Board grant it special permission to appeal the denial of its Motion to dismiss with prejudice, cancel the hearing scheduled for tomorrow and hold this matter in abeyance until such time as the Board shall decide whether this petition should be dismissed and, if so, whether it should be dismissed with prejudice.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: /s/

Douglas M. Topolski, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1909 K. Street, N.W., Suite 1000
Washington, DC 20006
(202) 263-0242

Ruth L. Goodboe, Esq.
Sarah M. Rain, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
34977 Woodward Avenue, Suite 300
Birmingham, MI 48009

(248) 593-6400

Attorneys for Cargill, Inc.

Dated: September 30, 2014

19079838.1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cargill, Inc.	
and	**Case No.: 21-RC-136849**
United Food & Commercial Workers International Union, Local No. 324	

APPEAL OF RULING OF THE REGIONAL DIRECTOR DENYING EMPLOYER'S MOTION TO DISMISS THE PETITION WITH PREJUDICE

Pursuant to Rule 102.65(c) of the Board's Rules and Regulations, Cargill, Inc. ("Cargill" or "Employer"), through its undersigned counsel, respectfully appeals the ruling of the Regional Director to the National Labor Relations Board ("the Board"), in the above-referenced matter. The grounds for such an appeal are set forth below.

I. BACKGROUND

This case involves a representation petition filed by the United Food & Commercial Workers International Union, Local No. 324 ("the Union") on September 16, 2014. It seeks a unit of only all full time and regular part time employees in the packaging, shipping, and receiving departments ("Second Petition"). It excludes "all others" and supervisors. The Union contends that lead employees are supervisors.

The Union previously filed a petition in Case No. 21-RC-133636 seeking an identical unit on July 28, 2014 ("First Petition"). Exhibit 1. A representation hearing on this First Petition was held on August 12, 2014. After changing its position on the unit sought numerous times, the

Union stated that it would only proceed on the First Petition in a unit of all full time and regular part time packaging, shipping, and receiving employees. It stated that the leads were excluded supervisors. Exhibit 2 at 270.

The Regional Director then issued her Decision and Order on the First Petition on September 11, 2014. Exhibit 3. In her Decision and Order ("the D&O"), the Regional Director found the unit sought by the Union inappropriate because the unit did not include packaging and shipping leads. Exhibit 3 at 12-13. The Regional Director correctly concluded on the record made on August 12, 2014 that the Union failed to meet its burden of showing that the lead employees in the packaging and shipping departments were supervisors under Section 2(11) of the National Labor Relations Act ("the Act"). As the Union repeatedly stated it did not wish to proceed on any unit other than the one for which it petitioned, the Regional Director dismissed the First Petition. *Id.*

In an attempt to avoid the findings of the D&O, and to relitigate the appropriateness of the unit, the Union filed this Second Petition before the period for requesting review of the D&O expired. It does so instead of seeking review of the D&O. Indeed, the Union seeks to ignore the Regional Director's Decision and Order altogether to the extent it still contends leads are supervisors. Cargill filed a Motion to Dismiss Petition with Prejudice ("Motion to Dismiss") in response to the Second Petition. Exhibit 4. The Regional Director denied this motion on September 29, 2014. Exhibit 5.

Cargill now appeals the Regional Director's Order Denying Employer's Motion to Dismiss Petition with Prejudice. The Union's Second Petition seeks the same unit that the Regional Diretor found inappropriate. The petition should be dismissed for this reason alone. Further, a six month prejudice period should have attached to the dismissal of the First Petition

in Case No. 21-RC-133636 because the Union proceeded through the close of a hearing to a decision and order. Given that the Union chose to forgo filing a request for review, the dismissal has the identical effect of a withdrawal after the close of a hearing, which requires a prejudice period of six months. The Board should not tolerate abuse of its processes by allowing a petitioner to obtain through outright dismissal without a request for review what it cannot get through a voluntary withdrawal. For these and all the reasons discussed below, the Employer's Motion to Dismiss the Petition With Prejudice should be granted.

II. ARGUMENT

A. The Regional Director Erred in Finding that the Union Can Petition for a Unit Determined Inappropriate in the Regional Director's Decision and Order, a Final Order from Which the Union Did Not Seek Review.

The Regional Director stated that "dismissal of the instant petition is not warranted simply because it was determined in Case 21-RC-133636 that the petitioned-for unit was inappropriate or because, pursuant to the Board's Rules and Regulations, the Regional Drector's decision is final." Exhibit 5 at 2. This is a misstatement of the Employer's position.

In its Motion to Dismiss, Cargill did not assert that the Second Petition should be dismissed solely because the unit was inappropriate, although this is grounds by itself to dismss the petition. Instead, and additionally, Cargill clearly and correctly demonstrated that the Union should not be permitted *to petition for a unit* that was expressly found to be inappropriate after it had a chance to fully litigate and appeal all relevant issues and change its postions on the record in light of the evidence submitted by the parties. *See* Exhibit 4. The Employer is not seeking a determination on the appropriateness of the unit at this time. To the contrary, that issue was already decided in Case No. 21-RC-133636 after full hearing. The Employer merely asked the

Regional Director to uphold the determination already made on the exact same issue raised by the petition in this matter.

The Union was given every opportunity at the hearing held on August 12, 2014 in Case No. 21-RC-133636 to present and change its positions concerning unit determinations. Indeed, it was given a recess expressly for the purpose of reconsidering whether it would proceed in any unit other than one it defined on the record. Exhibit 2 at 271-72. The Union, after full opportunity to consider its position and the ramifications thereof, stated clearly and unequivocally that it did not wish to proceed in any unit other than the one for which it petitioned, a unit that expressly excluded lead employees. *Id.* at 270-71. This was a unit of packaging, shipping, and receiving employees with lead employees excluded. *Id.* Upon the Regional Director's determination that this unit was inappropriate, the First Petition was properly dismissed.

The Board's Rules and Regulations make clear that the unit determinations made by the Regional Director after consideration of a hearing record and in the absence of a request for review are "final." 29 CFR § 102.67(b). The only way to challenge these determinations is to file a Request for Review with the Board. *Id.* Even then, the grounds for review are very narrow. 29 CFR § 102.67(c). The Union chose to either ignore or waive the well-established procedures for seeking review of the Regional Director's unit decision. Instead, the Union seeks to circumvent them by filing a new petition seeking the same unit the Regional Director stated unambiguously was "inappropriate." Exhibit 3 at 12-13.

The Board's Rules and Regulations do not permit a petitioner to change a position taken at the hearing solely because the party does not like the outcome that its position produced. They certainly do not permit allowing a petitioner to ignore the procedures requiring a request for

review altogether by filing a new petition seeking to re-litigate the same issues in the same unit at the same facility while the first petition is still pending or after a final order defining the unit has been issued. Thus, by denying Cargill's Motion to Dismiss, the Regional Director is permitting the Union to circumvent the well-established procedures for seeking review of Regional Director's decision made in an R case proceeding and the well-established six-month prejudice penalty for allowing a petiton to be withdrawn (or in this case dismissed without review) after the close of a hearing.

B. The Regional Director Erred in Holding that the Second Petition Does Not Constitute a Request to Reopen or Rehear the First Petition.

In denying the Motion to Dismiss, the Regional Director erroneously held that the Second Petition "does not constitute a request to re-hear or re-open the record in Case 21-RC-133636, or request for reconsideration of the Decision and Order in that case. . . ." Exhibit 5 at 2. This statement is incorrect because that is exactly what the Union has done by filing the Second Petition.

The Union had the opportunity to change its position at the hearing and agree to proceed in a unit other than the narrow one it sought at the hearing. Indeed, it was given a recess at the hearing expressly to reconsider its position on the unit. Exhibit 3 at 272-73. Nevertheless, the Union consciously chose to proceed to seek only a piece of an overall integrated production and maintenance unit and then only without lead employees. The Union also chose not to seek review of the D&O. Filing this Second Petition seeking the same unit as the First Petition is identical to seeking a reopening of the record in Case No. 21-RC-133636, reconsideration of the that matter, or a review of the D&O in that matter without following the requirements of the Board's Rules and Regulations.

A request to re-open the record after the close of the hearing, or a motion for reconsideration or for a rehearing for that matter, requires "extraordinary circumstances." 29 CFR § 102.65 (e)(1). Specifically excluded from such grounds is raising any issue that could have been raised but was not raised under any other section of the Rules. *Id.* Indeed, a request to re-open the record or for a rehearing requires specification of the error alleged, the prejudice to the movant caused by this error, what new evidence is to be produced, why it was not available at the hearing, and how it would change the result. *Id.* A motion for reconsideration requires the identification of a material error with particularity and page number of the record. Of course, these requests must be made in the proceeding where the record was created, *i.e.* Case No. 21-RC-133636. *Id.*

Realizing that it had and has no "extraordinary circumstances" on which to rely in Case No. 21-RC-133636 that would justify re-opening the record, conducting a rehearing, or pursuing re-consideration of the determinations in that case, the Union instead seeks to relitigate the issues already determined by the Regional Director because it was unsatisfied with the outcome. In obvious disregard for the Board's Rules and Regulations, the Union failed to avail itself of the available means to request review of the D&O. This disregard is inconsistent with the Board's well-established view that parties should not be allowed to litigate issues in an untimely or piecemeal fashion. *E.g.* 29 CFR § 102.65(e)(1)(no motion for reconsideration, rehearing or to re-open the record shall be considered by the Regional Director with respect to any matter that could have but was not raised pursuant any section of the Board's Rules); and *cf. Jefferson Chemical Co., Inc.*, 234 NLRB 992 (1972)(Board will not condone piecemeal litigation of ULP claims); *Peyton Packing Co., Inc.*, 129 NLRB 1358 (1961)(same). The Union's Second Petition

violates both of these principles and the Regional Director's denial of the Employer's Motion allows the Union to perpetuate these violations.

The Union had every opportunity to change its position as to what unit or units it would accept before and during the hearing in Case No. 21-RC-133636. The Regional Director issued the D&O based upon the evidence in the record and the Union's stated position that would not proceed to an election in any unit that included lead employees. The Union had procedures available to it to challenge the Regional Director's determinations based upon the record and the positions asserted by the Union. Whether the instant petition is considered an effort to re-litigate the same issues already decided in Case No. 21-RC-133636, or a piecemeal effort to offer a new position in a new proceeding as to the same unit at the same facility that was addressed or could have been addressed in Case No. 21-RC-133636, the Second Petition is inappropriate and should be dismissed.

The Regional Director's denial of the Motion to Dismiss, then, ignores two cruical and dispositive points requiring that the Motion to Dismiss be granted; the petitions seek identical units that the Regional Director found are not appropriate; or if they do not seek identical units, then the Second Petition is nothing more than a change in position on the unit that the Union could have and should have made prior to the close of the hearing in Case No. 21-RC-133636 to avoid the six-month prejudice penalty associated with filing another petition as to the same or a similar unit. In either case, the Second Petition should be dismissed with prejudice.

C. The Regional Director's Determination that Prejudice Should Not Apply to the Second Petition Ignores the Purpose of the Board's Rules.

As set forth above, the Board does not favor duplicative and/or piecemeal litigation. Thus, the Board should not permit the relitigation of issues previously decided where the Union

failed or refused to utilize the avenues for requesting review of unit decisions in representation matters. These principles requires dismissal of the Second Petition with prejudice.

In denying the Motion to Dimiss, the Regional Director stated that Board's *Casehandling Manual, Part Two, Representation Proceedings* ("CHM") § 11118 applies to prejudice only with respect to withdrawn petitions. This ignores the purpose of the rule. While § 11118 falls under the heading "Withdrawals," it also provides that "[t]he purpose of levying prejudice is to conserve the Agency's resources by discouraging repetitive and duplicative filings." CHM § 11118.

There is no practical or functional difference between seeking a withdrawal after the close of a hearing, which incidentally requires the approval of a Regional Director, and allowing the petition to be dismissed upon order of the Regional Director after considering the record of a hearing and without requesting review of adverse rulings. In both cases, the petitioner voluntarily seeks to end processing of a petition at the direction of a Regional Director after a hearing has been concluded.

If the Union had sought withdrawal of the petition in Case No. 21-RC-133636, it is clear that a prejudice period of six months against filing a new petition in the same or a similar unit would have accompanied any permission to withdraw because a hearing had concluded. CHM § 11118. It defies common sense and well-established Board principles concerning duplicative and piecemeal litigation to suggest that a petitoner can avoid this penalty period simply by losing the issue it litigates and declining to seek review of that loss in favor of filing a new petition that raises the same issues[1].

[1] In this regard, it does not matter if the cases declaring that the Board will not tolerate piecemeal or duplicative litigation arose in the unfair labor practice context as stated by the Regional Director. As this case demonstrates, repetitive and duplicative filings are just as wasteful of the Board's resources in the representation context as they are in the unfair labor practice context.

Otherwise, there literally is no purpose in having rules establishing how a petioner must request review of Regional Director's decision issued after a hearing closes. Any petitioner would be allowed to try one theory related to a unit, lose, decline to request review, and refile another petition seeking to relitigate the issue it lost or another issue concerning the same unit that it could or should have raised in the first proceeding. It is easy to see how abuse of this process could hold both employers and voting unit employees hostage to the restrictions and risks of the election process for months or years[2].

In the final analysis, the Union disclaimed interest[3], on the record, in any unit other than the one it defined on the record. The Regional Director then determined that the only unit sought by the Union was inappropriate. As a result, the Regional Director dismissed the First Petition. The Union, in an effort to avoid and ignore this decision or the need for grounds to properly seek its review, filed the Second Petition. The Second Petition as of this writing continues to seek exactly the same unit that the Regional Director found inappropriate. A petitioner should not be allowed relitigate issues until it gets the decision it wants or can live with after seeing how its other positions and theories might fare as it tests them one at a time in separate proceedings. This is exactly the type of "repetitive and duplicative filings" the Board prohibits by attaching prejudice in representation proceedings. The prejudice should be tied to whether the petitioner has participated in a hearing to its conclusion, not the manner in which a petitioner chooses to let a representation proceeding end after a hearing has been concluded.

---

[2] It is important to remember that an employer acts at its peril when making changes to wages, hours, and working conditions during the sterile period when a petition is pending. If petitoners are allowed to drag out the representation process for months or years with duplicative and repetitive filings, needed changes and improvements that would otherwise benefit potential unit employees could also be delayed.

[3] Again, the Regional Director's denial of this fact exhaults form over substance. Exhibit 2 at 2-3. While not identical to an incumbent union's disclaimer of interest,the Union's emphatic refusal to proceed to an election in any unit other than the one upon which it insisted is certainly a disclamer that it wishes to represent any other unit.

The Regional Director's ruling should be reversed and the Employer's Motion to Dismiss should be granted for these reasons as well.

D. The Regional Director's Finding that the First Petition and the Second Petition are not Identical is Erroneous.

To support denial of the Motion to Dismiss, the Regional Director stated that the units sought by the petitions are not identical. Exhibit 5 at 3. This statement is both unexplained and incorrect.

First, the Regional Director does not explain the differences between the two requested units. Exhibit 5 at 3. This is because none exist. In case 21-RC-133636, the Union stated on the record that it would proceed only in a unit of packaging, shipping, and receiving employees without leads. *See* Exhibit 2 at 270. This exactly what the Second Petiton says when it asks for the same three clasifications to exclusion of "all others." The Union has refused to concede that leads are not supervisors as found by the Regional Director in the D&O. *See* Exhibit 3.

Therefore, the units sought by the two petitions are identical. Since it is well established Board policy that petitions seeking inappropriate units should be dismissed, the Second Petition should be dismissed. See CHM § 11100. Since this occurred after a hearing has closed, the petition should be dismissed with prejudice for these reasons as well.

III. CONCLUSION

For all the foregoing reasons, Cargill respectfully requests that the ruling of the Regional Director be reversed and the Employer's Motion to Dismiss with Prejudice be granted.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: /s/

Douglas M. Topolski, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1909 K. Street, N.W., Suite 1000
Washington, DC 20006
(202) 263-0242

Ruth L. Goodboe, Esq.
Sarah M. Rain, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
34977 Woodward Avenue, Suite 300
Birmingham, MI 48009
(248) 593-6400

Attorneys for Cargill, Inc.

Dated: September 30, 2014

19079135.1

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of October, 2014 the foregoing Request for Special Permission to Appeal Ruling of the Regional Director Denying Employer's Motion to Dismiss the Petition with Prejudice and Appeal of Ruling of the Regional Director Denying Employer's Motion to Dismiss the Petition with Prejudice was filed electronically and that service copies were sent by electronic mail to:

Robert A. Cantore, Esq.
Gilbert & Sackman
3699 Wilshire Blvd Suite 1200
Los Angeles, CA 90010
rac@gslaw.org

Sylvia Meza, Field Examiner
National Labor Relations Board, Region 21
888 S. Figueroa Street, 9th Floor
Los Angeles, California 90017
Sylvia.Meza@nlrb.gov

William M. Pate, Acting Regional Director
National Labor Relations Board, Region 21
888 S. Figueroa Street, 9th Floor
Los Angeles, California 90017
William.pate@nlrb.gov

The undersigned further certifies that a copy of the foregoing document was served via Federal Express this 1st day of October, 2014 upon the following parties:

William M. Pate, Acting Regional Director
National Labor Relations Board, Region 21
888 S. Figueroa Street, 9th Floor
Los Angeles, California 90017
William.pate@nlrb.gov

Robert A. Cantore, Esq.
Gilbert & Sackman
3699 Wilshire Blvd., Ste 1200
Los Angeles, CA 90010

/s/
Douglas M. Topolski

INTERNET FORM NLRB-502 (2-08)

FORM EXEMPT UNDER 44 U.S.C.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
PETITION

DO NOT WRITE IN THIS SPACE

Case No.	Date Filed
21-RC-133636	7-28-14

INSTRUCTIONS: Submit an original of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

The Petitioner alleges that the following circumstances exist and requests that the NLRB proceed under its proper authority pursuant to Section 9 of the NLRA.

1. PURPOSE OF THIS PETITION (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One)

- [x] **RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- [ ] **RM-REPRESENTATION (EMPLOYER PETITION)** - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- [ ] **RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE)** - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- [ ] **UD-WITHDRAWAL OF UNION SHOP AUTHORITY (REMOVAL OF OBLIGATION TO PAY DUES)** - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- [ ] **UC-UNIT CLARIFICATION** - A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees: (Check one) [ ] In unit not previously certified. [ ] In unit previously certified in Case No. _____
- [ ] **AC-AMENDMENT OF CERTIFICATION** - Petitioner seeks amendment of certification issued in Case No. _____ Attach statement describing the specific amendment sought.

2. Name of Employer	Employer Representative to contact	Tel. No.
Cargill	Jesus J. Valadez	714-449-6735

3. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)	Fax No.
569 & 560 N. Gilbert Street Fullerton, CA 92833	71449-6780

4a. Type of Establishment (Factory, mine, wholesaler, etc.)	4b. Identify principal product or service	Cell No.
Factory	Cooking Oil	e-Mail

5. Unit involved (In UC petition, describe present bargaining unit and attach description of proposed clarification.)	6a. Number of Employees in Unit:
Included: All Full time & Part time regular production employees	Present: 36
Excluded: Managers, supervisors, leadmen, office clerical, temporary employees(temps) and gurards as defined in the act.	Proposed (By UC/AC)
(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)	6b. Is this petition supported by 30% or more of the employees in the unit? [x] Yes [ ] No *Not applicable in RM, UC, and AC

7a. [ ] Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about (Date) _____ (If no reply received, so state).

7b. [ ] Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Name of Recognized or Certified Bargaining Agent (If none, so state.)	Affiliation	
None		
Address	Tel. No.	Date of Recognition or Certification
	Cell No.	Fax No. / e-Mail

9. Expiration Date of Current Contract, If any (Month, Day, Year)	10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop (Month, Day and Year)

11a. Is there now a strike or picketing at the Employer's establishment(s) involved? Yes [ ] No [x]	11b. If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of (Insert Name) _____, a labor organization, of (Insert Address) _____ Since (Month, Day, Year) _____

12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above. (If none, so state)

Name	Address	Tel. No.	Fax No.
None		Cell No.	e-Mail

13. Full name of party filing petition (If labor organization, give full name, including local name and number)
United Food & Commericial Workers Union Local 324

14a. Address (street and number, city, state, and ZIP code)	14b. Tel. No. EXT	14c. Fax No.
8530 Stanton Ave. Buena Park, Ca 90622	714-986-4601	714-229-1159
	14d. Cell No.	14e. e-Mail

15. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (to be filled in when petition is filed by a labor organization)
United Food & Commericial Workers International Union. AFL-CIO

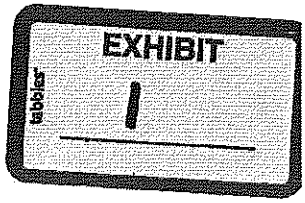
I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print)	Signature	Title (if any)
~~Gilbert Davila~~ Jose Perez		~~Director of Organizing~~ Organizer
Address (street and number, city, state, and ZIP code)	Tel. No. 714-985-4601	Fax No. 714-229-1159
8530 Stanton Ave. Buena Park, CA 90622	Cell No. 714-926-8417	eMail gdavila@ufcw324.org

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.



OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 21

In the Matter of:

Cargill, Inc., Case No. 21-RC-133636

Employer,

and

United Food & Commercial
Workers Union Local No. 324,

Petitioner.

Place: Los Angeles, California

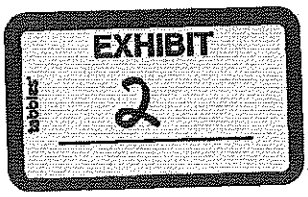
Dates: August 12, 2014

Pages: 1 through 274

Volume: 1

OFFICIAL REPORTERS

AVTranz
E-Reporting and E-Transcription
845 North 3rd Avenue
Phoenix, AZ 85003
(602) 263-0885



leads and that Steve Lim are supervisors under the Act and maintains that they are employees under the Act.

Can the parties briefly restate their positions regarding the outstanding issues for the record? And whoever wants to go first.

MR. CANTORE: I will repeat the position that --

HEARING OFFICER MEZA: Okay.

MR. CANTORE: -- the leads are supervisors, that the packaging, shipping and receiving is an appropriate unit. And we also do not believe that one additional employee, Kimberly Cruz, is in the packaging unit even though she's listed here. She works in engineering, works on the other side of the tracks and I don't know why she's in packaging.

HEARING OFFICER MEZA: Okay. Wait. So are you raising a whole new issue at this time?

MR. CANTORE: I am saying we're going to challenge her when she votes.

HEARING OFFICER MEZA: Okay.

MR. CANTORE: Nothing more than that.

HEARING OFFICER MEZA: Okay. That's all you're saying?

MR. CANTORE: Yes.

HEARING OFFICER MEZA: Okay. All right. Okay. Anything else? Okay. Mr. Topolski?

MR. TOPOLSKI: Our -- our position hasn't changed since the beginning of the hearing. I believe that the Union -- that the

HEARING OFFICER MEZA: Off the record then?

MR. CANTORE: -- we want to go forward in another unit, and now he's having second thoughts. So why don't we --

HEARING OFFICER MEZA: Do we need to go off the record?

MR. CANTORE: We need to go off the record --

HEARING OFFICER MEZA: Okay.

MR. CANTORE: -- for a minute.

HEARING OFFICER MEZA: Off the record.

MR. CANTORE: That's fine.

(Off the record at 3:46 p.m.)

HEARING OFFICER MEZA: Okay. On the record.

Okay. So, Mr. Cantore, you were just discussing off the record whether you wanted to change your --

MR. CANTORE: I would not.

HEARING OFFICER MEZA: -- position on accepting an alternate unit. Okay. So, no?

MR. CANTORE: No.

HEARING OFFICER MEZA: Your answer's still the same? Okay. All right. Let's see here. Okay. So I think the last question was whether there's anything further the parties desire to present.

MR. CANTORE: And the answer's no.

MR. TOPOLSKI: The answer's no.

HEARING OFFICER MEZA: Okay. So both parties stated no.

And do the parties wish to waive the filing of briefs?

MR. CANTORE: No.

MR. TOPOLSKI: No.

HEARING OFFICER MEZA: Okay. And the briefs will be due -- briefs will be due on August 19th, 2014. And that's seven days from today, correct? All right.

Okay. Mr. Topolski, have all exhibits been offered?

MR. TOPOLSKI: Yes.

HEARING OFFICER MEZA: Okay. And, Mr. Cantore, have all exhibits --

MR. TOPOLSKI: Let's check the record.

HEARING OFFICER MEZA: -- been offered?

MR. TOPOLSKI: Exhibits 1 and 2 is all I have. I believe they've been offered and introduced, correct? Were they?

HEARING OFFICER MEZA: Yes. Okay.

MR. CANTORE: And all of mine, two exhibits?

HEARING OFFICER MEZA: Okay. So both Employer's Exhibit 1 and 2 have been received and Petitioner's Exhibit 1 and 2 have been received into the record. Okay. So if there is nothing further, the hearing will be closed.

MR. TOPOLSKI: Yeah.

MR. CANTORE: Yeah.

HEARING OFFICER MEZA: Hearing no response, the hearing is now closed.

(Whereupon, the hearing in the above-entitled matter was closed at 3:54 p.m.)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

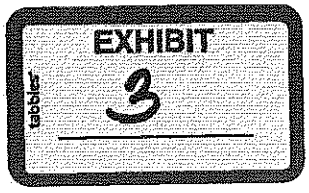
CARGILL, INC.[1] Employer and **UNITED FOOD & COMMERCIAL WORKERS UNION LOCAL NO. 324**[2] Petitioner	Case 21-RC-133636

DECISION AND ORDER

United Food & Commercial Workers Union Local No. 324 (Petitioner) filed the instant petition on July 28, 2014, seeking to represent all full-time and regular part-time packaging, shipping, and receiving employees employed by the Employer at its facility located at 566 North Gilbert Street, Fullerton, California for collective-bargaining purposes; excluding all other employees, packaging leads, shipping leads, office clerical employees, professional employees, staffing agency employees, guards and supervisors as defined in the National Labor Relations Act.[3]

The Employer contends that the petitioned-for unit is not an appropriate unit because it does not include the maintenance, terminal, and quality-control employees, who share a

[1] The Employer's name appears as amended at the hearing.
[2] The Petitioner's name appears as amended at the hearing.
[3] The Petitioner amended the unit description at the hearing.



community of interest with the petitioned-for employees. In addition, the Employer contends that the packaging and shipping leads are not supervisors as defined in the Act, and should also be included in the unit.

On August 12, 2014, a hearing in this matter was held before a hearing officer of the National Labor Relations Board (the Board), and the parties thereafter filed briefs. Pursuant to the provisions of Section 3(b) of the National Labor Relations Act (the Act), the Board has delegated its authority in this proceeding to me.

I. THE ISSUES AND SUMMARY

The issues are:

1. Whether the packaging, shipping, and receiving employees share an overwhelming community of interest with the maintenance, terminal, and quality-control employees, so as to be included in a single unit for purposes of collective bargaining.
2. Whether the packaging leads (Jaime Sedano and Rafael Rodriguez), the shipping lead (Raymond Ramirez), and a quality-control employee (Steve Lim), are supervisors under the Act. The Petitioner contends that they are supervisors as defined by Section 2(11) of the Act. The Employer contends that they are employees as defined in the Act, and should be included in the unit.

Based on the record in its entirety, I find that the packaging and shipping leads are not supervisors as defined in the Act, and should be included in any appropriate unit. Thus, I find that the petitioned-for unit is not an appropriate unit because it excludes the packaging and shipping leads. At the hearing, the Petitioner stated that it does not wish to proceed to an

election in any alternate unit if the unit sought by the Petitioner is deemed to be inappropriate. Therefore, I hereby dismiss the petition.[4]

FACTUAL BACKGROUND

A. Overview of the Employer's Operation

The Employer is engaged in the business of operating an oil processing facility in Fullerton, California.[5] Oil arrives at the facility in bulk via railcars or trucks. It is then stored, tested in a lab at the facility, certain oils are blended, and oil ultimately get packaged and shipped to customers. A total of 51 employees (including 3 leads) work in the following departments: terminal, quality-control, maintenance, packaging, shipping, and receiving.[6]

Terminal employees unload the oil from railcars or trucks, and transfer it to the appropriate tanks. The quality-control department (also known as the lab) is in charge of testing the oil each time it gets moved within the facility and after it gets blended. This department has four lab technicians who perform the analysis to test the oil. Various employees, including terminal employees, leads, and certain packaging employees, drop off oil samples at the lab for testing. The maintenance department currently consists of four mechanics responsible for repairing equipment in the facility, including equipment used by machine operators in the packaging department.

---

[4] Since the Petitioner does not wish to proceed to an election in any alternate unit, it is not necessary to rule on the issues of: (1) whether the packaging, shipping, and receiving employees share an overwhelming community of interest with the maintenance, terminal, and quality-control employees; and (2) whether Steve Lim, a quality-control employee, is a supervisor as defined in the Act.

[5] The parties agreed to a commerce stipulation: the Employer, a Delaware corporation, with a facility located at Fullerton, California, is engaged in the business of operating an oil processing facility. During the past 12 months, a representative period, the Employer, purchased and received goods valued in excess of $50,000 which goods were shipped directly to the Employer's Fullerton, California facility from points located outside the State of California.

[6] Eight employees work in the terminal, 4 in quality-control, 4 in maintenance, 23 in packaging, 9 in shipping, and 3 in receiving.

Packaging-department employees perform various tasks. There, employees operate one of four lines: one where oil is packed into 35 lb. jugs in a cardboard boxes; one where it gets packed as a 50 lb. cube; one where oil gets packed into 5-quart bottles; and a so-called OLE line where oil get packed in different types of smaller bottles. Among the packaging employees, some work as relievers, votator operators, filler operators, or depalletizers. Relievers are responsible for filling in and relieving anyone in the lines, votator operators operate a particular machine that adjusts the viscosity of the oil, filler operators operate the machines in the line, and depalletizers remove boxes from pallets. Other packaging employees use forklifts to move the packaged oil to a warehouse area.

Thereafter, the oil gets shipped out by employees in the shipping department. Shipping employees either load trucks with finished product or perform clerical work related to shipping.

The receiving department handles the purchase and receipt of raw materials. The purchaser coordinates the purchase of raw materials while the other receiving employees operate forklifts to unload and store the material at the facility.

Stephanie Puig ("Puig") is the supervisor of the terminal, packaging, shipping, and receiving departments. In those departments, Puig is responsible for issuing any necessary discipline. She is also involved in hiring for those departments. Employees go to her to request time off, and she approves vacation requests. She is also responsible for conducting performance appraisals for those employees.

B. Packaging Leads Jaime Sedano and Rafael Rodriguez[7]

There are two leads in the packaging department; Jaime Sedano ("Sedano"), first-shift lead, and Rafael Rodriguez ("Rodriguez"), the second-shift lead. Their duties are to monitor the

[7] Neither of these two leads testified at the hearing.

schedule for the lines in packaging. The record evidence is not clear as to what "monitoring" the packaging lines entails. The packaging leads also take oil samples to the lab. In addition, they monitor orders in the computer system and perform other computer functions. They can operate the machines in the packaging area.

1. Jaime Sedano

a. Transfer / Recommendation to transfer

The Petitioner presented Carlos Hernandez ("Hernandez"), a receiving-department employee, as a witness at the hearing. According to Hernandez, Sedano transferred him from the packaging department to receiving department about three months ago. In this regard, Hernandez testified that Sedano told him to "go and help at receiving" and left him there. Hernandez admitted that he does not know whether Sedano received instructions from someone else to transfer him. Hernandez testified that Sedano simply told him to "go help" in receiving.

At the hearing, the Petitioner also presented employee Carlos Alban ("Alban"), who testified that Sedano told him that Sedano was going to recommend him for his current position as purchaser in the receiving department. The record is not clear as to when this conversation took place.[8] According to Alban, Sedano was the purchaser before Sedano was promoted to be a lead. Alban testified that Sedano trained Alban for two weeks for the purchaser job sometime before the official announcement was made that Sedano was going to become the packaging lead. Alban further testified that Sedano told him, "You know what, I will put my word, you know, for you to be the purchaser."

At the hearing, Alban also stated that he submitted an application for this job, and that he was interviewed by Plant Manager Jesus Valadez, Project Engineer Linsay Farrell, and

[8] Alban has worked as a purchaser for about 7 months. Presumably, the conversation happened around that time. Prior to becoming a purchaser, Alban worked in another area at the facility.

Sedano. On cross-examination, Alban admitted that he does not know what weight was given to Sedano's recommendation in the decision to move him to his current position.[9]

b. Assignment of overtime

Employee Israel Ramirez testified that Sedano has sometimes told him that he has to come in on Saturday to work overtime, but that most of the time the Employer asks for volunteers to work overtime. On rebuttal, Puig testified that the overtime schedule is made by Kelli Stiver, the production scheduler. If production is running behind, Stiver consults with Puig to determine whether overtime is necessary to catch up. The Employer tries to give employees advance notice of overtime. However, when enough notice cannot be provided, the Employer will solicit volunteers. According to Puig, Sedano's only role in this process is to write down the names of those who volunteer, and submit them to her for approval of payroll.

c. Assignment of work

The only evidence of Sedano's involvement in the assignment of work was adduced by certain questions asked by the hearing officer during Puig's testimony. Puig testified that packaging leads have assigned other workers to do certain specific task such as to go dump reprocessed oil.

2. Rafael Rodriguez

As noted above, Puig testified that packaging leads (Sedano and Rodriguez) may assign employees to go dump reprocessed oil. There is no other evidence in the record specifically pertaining to Rodriguez's duties as a lead.

[9] Puig, who was not working at the facility during the time that Alban was hired as the purchaser, testified that she does not know who approved his transfer.

C. Shipping Lead Raymond Ramirez[10]

The shipping department has one lead, Raymond Ramirez ("Ramirez"). All employees in that department work the first shift. There are a few hours during the shift when Puig is not onsite, and shipping lead Ramirez monitors the operation of the department. The record contains limited evidence detailing what Ramirez does to monitor the department. This evidence primarily comes from Puig's testimony. For example, on cross-examination, Puig testified that if a fight breaks out among shipping employees when she is away, the shipping lead will call her. She will then decide whether anyone should be sent home.

During examination by the hearing officer, Puig testified that Ramirez has assigned others to do inventory checks. Inventory is routinely checked once the end of each month for accounting purposes, but Ramirez can assign someone to do an inventory check at other times if needed. Puig further testified that Ramirez can also assign employees to move product from one area of the warehouse to another. According to Puig, Ramirez spends much of his time on what the Employer calls "Idoc failures," which means correcting computer-system communication failures. There is no other evidence in the record describing Ramirez's duties.

D. Other Evidence Related to the Supervisory Status of Leads.

Employee Alban testified that he was initially hired to work at the Employer's facility as lead-temporary worker through a staffing agency two years ago. Alban testified that when he was a lead, he fired a worker "on the spot." The record does not indicate precisely when this happened. The worker that he fired was a temporary employee who got into a fight with another temporary worker. No further details of this incident were provided at the hearing.

[10] Raymond Ramirez did not testify at the hearing.

Alban also testified that when he worked as a lead, he was not referred to as a "Supervisor One." He claims that he first heard this phrase from a manager named Mike Mattingly[11] about two weeks prior to the hearing in this case. According to Alban, he and Mattingly were discussing the Union when Mattingly mentioned that the leads were considered level-one supervisors. No other employee testified that leads are known as "level-one supervisors," and no employees testified that they view their leads as supervisors.

ANALYSIS

A. Section 2(11) Supervisor Legal Frame Work

The Petitioner asserts that the packaging and shipping leads are statutory supervisors as defined by Section 2(11) of the Act. The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). Section 2(11) of the Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment.

Under Board and Supreme Court precedent, in order to be a statutory supervisor, an individual must have the authority to effectuate or effectively recommend at least one of the supervisory indicia enumerated in Section 2(11) of the Act, using independent judgment in the interest of the employer. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001)).

[11] The record is not clear as to who is Mike Mattingly. He was described by Alban as the plant manager's boss.

Supervisory status must be established by a preponderance of the evidence. *Oakwood Healthcare, Inc.*, supra at 694. Lack of evidence is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). "[W]henever the evidence is in conflict or otherwise inconclusive on particular indicia or supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Further, job descriptions and job titles are only paper authority and are not given any controlling weight by the Board. *Avante at Wilson, Inc.*, id.; *Training School at Vineland*, 332 NLRB 1412, 1416 (2000).

In the instant case, the Petitioner has failed to meet its burden in establishing the supervisory status of the packaging and shipping leads. None of the packaging and shipping leads were presented at the hearing to testify with respect to their day-to-day duties. Only three employee witnesses testified regarding the duties of the leads to whom they allegedly report, but their testimony lacked detail. The record in general is devoid of detailed evidence as to the responsibilities and duties of the leads. Instead the Petitioner relied largely on general conclusionary statements made by the employee witnesses, and limited testimonial evidence adduced by the Petitioner during Puig's cross-examination.

The Petitioner claims that the leads are referred to by the Employer as level-one supervisors. But, the only evidence presented to support this claim was Alban's testimony that Manager Mike Mattingly made a comment to that effect. This evidence is insufficient to prove

this allegation. Although the Petitioner presented four employee witnesses, none of them testified that the leads are known as level-one supervisors or that they view their leads as supervisors. Moreover, as the Petitioner correctly noted in its brief, supervisory status is determined by an individual's duties, not by his job title or classification. As discussed below, the record evidence regarding the leads' duties failed to establish that the leads are supervisors.

B. Packaging Lead Jaime Sedano

The Petitioner contends that the packaging leads are supervisors because they can assign employees to perform specific duties, assign employees to specific departments, and assign overtime.

However, the only evidence presented regarding the packaging leads' involvement in the assignment of work was through Puig's testimony when she stated that packaging leads can ask employees to go "dump reprocessed oil." No specific examples or direct evidence of work assignments by the packaging leads were presented. Without other evidence, the act of simply asking employees to dump oil does not rise to the level of independent judgment necessary to establish that the leads exercise the requisite statutory authority to assign or direct. Accordingly, the record evidence is insufficient to establish these indicia.

As to the alleged assignment of employees to specific departments, employee Hernandez testified that Sedano transferred him from the packaging department to the receiving department. But, the only other detail provided about Sedano's involvement in this transfer was that Sedano told Hernandez to "go help out in receiving." Hernandez admitted that he did not know whether Sedano was following instructions from someone above him. The record evidence does not establish who made the decision to transfer Hernandez, nor does it fully describe the extent of

Sedano's role in the transfer. Accordingly, this evidence is insufficient to show that Sedano and the other leads have authority to transfer or reassign workers to different departments.

The Petitioner also claims that leads can effectively make hiring recommendations. In this regard, employee Alban testified that before it was officially announced that Sedano was going to become a lead, Sedano trained Alban for the position of purchaser, a position held by Sedano before he became a lead. Alban testified that Sedano told him, "I will put my word, you know, for you to be the purchaser." It is not clear on the record whether Sedano made this statement before or after he became a lead. Alban admitted that he submitted an application for the purchaser position, and that he was interviewed by the plant manager along with a project engineer and Sedano. However, the record lacks any details regarding the alleged interview or the extent of Sedano's participation in it. Accordingly, without context and explanation, I cannot find that Sedano effectively made a hiring recommendation. [12]

Likewise, there is insufficient evidence to conclude that leads have authority to assign overtime. The only evidence presented in support of this claim is employee Israel Ramirez's testimony that Sedano has sometimes told him that he has to come in on Saturdays, but that now the Employer seeks volunteers most of the time. The Petitioner did not present any further details regarding the assignment of overtime. On rebuttal, Puig testified that the lead's role in scheduling overtime is to solicit and write down the names of employees who volunteer for overtime. Thus, the record evidence failed to establish that leads assign overtime. Where there is

[12] Nor can I conclude that the leads have authority to discharge employees as contended by the Petitioner. Although employee Alban testified that he fired a temporary employee when he was a lead sometime around one or two years ago, Alban provided very limited details of this event. Even if Alban exercised independent authority to discharge an employee, that would be insufficient to establish that the current leads at issue in this case (Sedano, Rodriguez, and Ramirez) have the authority to discharge.

inconclusive evidence, the party asserting supervisory status has failed to meet its burden. *Dean & Deluca New York, Inc.*, 338 NLRB at 1048.

The Petitioner did not present other evidence of Sedano's supervisor authority. Therefore I find that Petitioner failed to meet its burden to prove that Sedano is a supervisor as defined in Section 2(11) of the Act.

C. Packaging Lead Rafael Rodriguez

The only record evidence regarding the duties of packaging lead Rodriguez was testimony by Puig stating that packaging employees (Sedano and Rodriguez) can assign employees to go "dump reprocessed oil." For the reasons discussed above, this evidence is insufficient to establish that the packaging leads are statutory supervisors. Therefore, I find that the Petitioner failed to meet its burden to prove that Rodriguez is a supervisor as defined in Section 2(11) of the Act.

D. Shipping Lead Raymond Ramirez

The Petitioner suggests that leads are supervisors because they monitor the operations of their department and are accountable for their performance when Puig is away from the plant. Puig admitted that she is away from the facility during a portion of the shipping department's shift, and acknowledged that the shipping lead (Ramirez) monitors the department during this time. However, no evidence was produced by the Petitioner to explain what Ramirez does to "monitor" the department.

The only other evidence that was presented regarding Ramirez's duties was Puig's testimony that Ramirez can assign employees to do inventory checks or to move product from one part of the warehouse to another. This limited evidence suggests that these assignments are merely routine and ministerial. Thus, the evidence is insufficient to show that Ramirez exercised

any supervisory authority. Therefore, I find that the Petitioner failed to meet its burden to prove that shipping lead Ramirez is a Section 2(11) supervisor as defined in the Act.

CONCLUSION

Based on the entire record in this matter and in accordance with the discussion above, I find and conclude that:

1. The hearing officers' rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner did not meet its burden of establishing that the packaging and shipping leads are supervisors as defined in Section 2(11) of the Act. Therefore, the petitioned-for unit is inappropriate because it excludes the packaging and shipping leads.

5. Since the Petitioner does not wish to proceed to an election in any alternate unit if the petitioned-for unit was deemed to be inappropriate, I hereby dismiss the Petition.

ORDER

IT IS HEREBY ORDERED that the Petition in this matter, be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by September 25, 2014. The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov,[13] but may not be filed by facsimile.

DATED at Los Angeles, California, this 11th day of September, 2014.

Olivia Garcia
Regional Director, Region 21
National Labor Relations Board

[13] To file the request for review electronically go to www.nlrb.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlrb.gov.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

CARGILL, INC.

Employer

and

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 324

Case No. 21-RC-136849

Petitioner

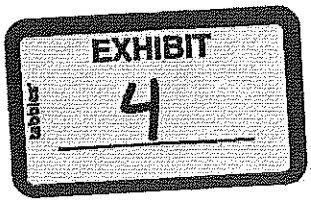
EMPLOYER'S MOTION TO DISMISS THE PETITION WITH PREJUDICE

Employer, Cargill, Inc. ("Employer" or "Cargill"), through undersigned counsel, respectfully requests that the Regional Director dismiss the above-captioned petition with prejudice. Accordingly, for the reasons discussed below, Employer's Motion to Dismiss the Petition with Prejudice should be granted.

INTRODUCTION AND PROCEDURAL HISTORY

The petition in this case represents the second time within weeks that United Food & Commercial Workers International Union, Local No. 324 ("the Union") has sought an election in an inappropriate unit of a portion of the production and maintenance employees employed by Cargill at its Fullerton, California facility ("the Facility"). The first petition was properly dismissed. *See* Exhibit 1, Decision and Order (D&O) in Case 21-RC-133636 (decided September 11, 2014). This most recent petition should be dismissed as well.

The Union filed its first petition addressing the Facility on July 28, 2014 in Case No. 21-RC-133636. Exhibit 1 at 1. After changing its position several times, the Union



stated at the unit determination hearing that it would proceed only in a unit of all full time and regular part time packaging, shipping, and receiving employees. *See* Exhibit 1 at 1-2; *see also* Exhibit 2, 21-RC-133636 2014 08-12 Hearing Transcript (Tr.) at 271-72[1]. The Union contended that lead operators and employees should be excluded because they were supervisors within the meaning of Section 2(11) of the National Labor Relations Act ("the Act"). *E.g* Exhibit at 1. Cargill sought to include all lead operators and employees as well as terminal, quality, and maintenance employees. *Id.* 2-3.

Upon the record produced at a hearing lasting a full day, the Regional Director concluded in the D&O that the Union had failed to meet its burden of showing that the lead operators and employees were 2(11) supervisors. Exhibit 1. Thus, the Regional Director correctly concluded that the unit sought by the Union was not appropriate. *Id.* at 13. Since the Union expressly disclaimed interest in proceeding in any unit other than the one it demanded that excluded the lead operators and employees, the Regional Director properly dismissed the petition. *Id.* at 13-14.

The Union responded by filing a second petition in Case No. 21-RC-136849 on September 16, 2014. As explained to the Employer's counsel by the Region, the Union again seeks a unit of only all full time and regular part time employees in the packaging, shipping, and receiving departments. The Union refuses to concede that lead operators in the departments it seeks must be part of any appropriate unit as determined by the Regional Director in Case No. 21-RC-133636. Thus, the petition in this mater seeks exactly the same unit already found inappropriate in Case No. 21-RC-133636.

---

[1] Only relevant portions of the transcript of the hearing in Case No. 21-RC-133636 are included within Exhibit 2.

The Employer informed the Region of its position concerning the second petition by e-mail on September 17, 2014. The Employer correctly observed that the unit sought by the Union was inappropriate by definition because the Union refused to include the lead employees the Regional Director just days before said must be included in any appropriate unit. This alone should require dismissal. Second, the Employer correctly observed that the Union had expressly disclaimed interest in any unit except the one upon which it insisted at the hearing. Therefore, the dismissal in Case No. 21-RC-133636 should be treated as one with prejudice, barring the Union from filing any petition concerning the Facility's production and maintenance employees for 6 months.

The Region informed Employer's counsel by telephone on September 19, 2014 that it was holding in abeyance the processing of the instant matter. A written notice was issued on September 19, 2014 informing the parties of this fact and postponing indefinitely the hearing scheduled for September 26 2014.

Late in the afternoon on September 22, 2014, Counsel for Employer was informed by telephone that the Region had decided to resume processing the petition in this matter. The Region inquired as to whether Employer would be available for a hearing on October 2, 2014. The Region stated that efforts to obtain a stipulation would be pursued once the time for filing a Request for Review in Case No. 21-RC-133636 expired. Counsel for the Employer replied by stating that Employer had not changed its position that the petition in this matter should be dismissed. Employer was informed by e-mail on September 23, 2014 that notwithstanding uncertainty about whether Employer's witnesses might be available, a hearing has been scheduled in this matter for October 2, 2014. This Motion follows.

ARGUMENT

As stated above, the Union was given every opportunity at the hearing held on August 12, 2014 in Case No. 21-RC-133636 to present and change its positions concerning unit determinations at the Facility. Indeed, it was given a recess near the close of the hearing for the sole purpose of reconsidering whether it would proceed in any unit other than one it defined on the record. Exhibit 2, Tr. 271-72. After being given all the time it wanted to define its position, and after being given every opportunity to present all the evidence it wanted to introduce, the Union clearly stated its conclusion. When asked after the recess if it wanted to change its position that it would proceed to an election only in a unit of packaging, shipping, and receiving employees without lead operators and employees (*see* Exhibit 2, Tr. at 270), the Union said simply "No." Exhibit 2, Tr. at 272. Given these irrefutable circumstances, the National Labor Relations Board's ("the Board") Rules and Regulations, well established legal principles, and the Casehandling Manual all require dismissal of this petition with prejudice.

First, the Board's Rules and Regulations make clear that the unit determinations made by the Regional Director after consideration of a hearing record are "final." 29 CFR § 102.67(b). The only way to challenge these determinations is to file a Request for Review with the Board. *Id.* Even then, the grounds for review are very narrow. 29 CFR § 102.67(c). They do not include permitting a petitioner to change a position taken at the hearing solely because the party does not like the outcome that its position produced. They certainly do not permit allowing a petitioner to ignore the procedures requiring a request for review altogether by filing a new petition seeking to re-litigate the same issues in the same unit at the same facility while the first petition is still pending.

Second, any effort by the Union to change the position it took at the hearing in Case No. 21-RC-122636 would by definition require a re-opening and then reconsideration of the record. The Rules and Regulations do not permit the Union to do this in the circumstances created by the two petitions it has filed. A request to re-open the record after the close of the hearing, or a motion for reconsideration or for a rehearing for that matter, requires "extraordinary circumstances." 29 CFR § 102.65 (e)(1). Specifically excluded from such grounds is raising any issue that could have been raised but was not raised under any other section of the Rules. *Id.* Indeed, a request to re-open the record or for a rehearing requires specification of the error alleged, the prejudice to the movant caused by this error, what new evidence is to be produced, why it was not available at the hearing, and how it would change the result. *Id.* A motion for reconsideration requires the identification of a material error with particularity and page number of the record. Of course, these requests must be made in the proceeding where the record was created, *i.e.* Case No. 21- RC-133636. *Id.*

The Union cannot hope to even pretend that any "extraordinary circumstances" exist in Case No. 21-RC-133636 that would justify re-opening the record, conducting a rehearing, or pursuing re-consideration of the determinations in that case. To the contrary, the record makes clear that the Union was given a recess at the hearing for the express purpose of reconsidering its position as to whether and to what extent t would proceed with an election in any unit other than the portion the integrated production and maintenance unit it sought. If it wanted to change its position on which units it finds acceptable, it should have done so when given the opportunity in Case No. 21-RC-133636. Again, the Union cannot avoid consequences of its actions and decisions or the required procedures

required to challenge these consequences merely by completely ignoring them in favor of starting a new proceeding for sole purpose of re-litigating issues that have been decided already.

Third, the Board has been consistent in its view that parties should not be allowed to litigate issues in an untimely or piecemeal fashion. *E.g.* 29 CFR § 102.65(e)(1)(no motion for reconsideration, rehearing or to re-open the record shall be considered by the Regional Director with respect to any matter that could have but was not raised pursuant any section of the Board's Rules); and *cf. Jefferson Chemical Co., Inc.,* 234 NLRB 992 (1972)(Board will not condone piecemeal litigation of ULP claims); *Peyton Packing Co., Inc.,* 129 NLRB 1358 (1961)(same). The Union's petition in this matter violates both of these principles.

The Union had every opportunity to change its position as to what units it would accept before and during the hearing in Case. No. 21-RC-133636. The Regional Director issued her decision based upon the evidence in the record and the Union's stated position as to whether and to what extent it would proceed to an election based upon determinations made on that record. Exhibit 1. The Union has procedures available to it to challenge the Regional Director's determinations based upon the record and the positions asserted by the Union. Whether the instant petition is considered an effort to re-litigate the same issues already decided in Case No. 12-RC-133636, or a piecemeal effort to offer a new position in a new proceeding as to the same unit at the same facility that was addressed in Case 21-RC-133636 that could have and should have been made in the first case, it is clear that the Union's petition in this case is improper and should be dismissed.

Finally, the Casehandling Manual makes clear that the instant petition should be dismissed regardless of how the Union attempts to define it. To the extent the Union seeks the same unit it sought in Case No. 21-RC-133636, this unit has already been found inappropriate and the petition should be dismissed for this reason alone. Casehandling Manual Part Two Representation Proceedings (CHM) § 11011. To the extent the Union purports to change its position in this case and seek a different portion of the unit at issue in Case No. 21-RC-133636, it cannot do so without first accepting the dismissal of the petition in Case No. 21-RC-133636, requesting review of the decision in that case, or seeking withdrawal of the petition. Accepting dismissal, or any withdrawal to the extent such an option is even available at this stage, must come with prejudice and with a six month bar to filing a new petition. *E.g.* CHM § 11112.1(a).

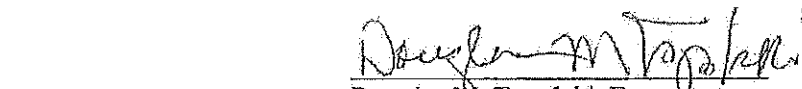
In the final analysis, nothing allows a petitioner to file a completely new petition while a petition filed by the same petitioner addressing the same issues in the same unit at the same employer facility is pending. This is particularly true when, as in this matter, the sole reasons for filing the second petition are to avoid the determinations made in the first proceeding that the petitioner does not like while providing the petitioner the chance to re-litigate issues that have already been decided, or raise issues that should have been raised or can still be raised, in the first and pending proceeding. One need only state this position to demonstrate its complete lack of merit. To let this matter proceed any further would violate the requirements of the Board's Rules and Regulations, violate well-established Board principles prohibiting raising issues in an untimely and/or piecemeal fashion, and violate the provisions of the CMH. Indeed, declining to dismiss this petition is nothing

short of a denial of due process. For these and all the reasons set out above, this petition should be dismissed immediately and with prejudice without further proceedings.

CONCLUSION

For the reasons set forth above, Employer's Motion to Dismiss the Petition with Prejudice should be granted. The petition should be dismissed with prejudice and Petitioner should not be permitted to file a petition for any election in a production and maintenance unit at Employer's Fullerton, California facility for a period of six months from the date of the Order dismissing this petition.

Respectfully submitted,



Douglas M. Topolski, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1909 K. Street, N.W., Suite 1000
Washington, DC 20006
(202) 263-0242

Ruthie L. Goodboe, Esq.
Sarah M. Rain, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
34977 Woodward Avenue, Suite 300
Birmingham, MI 48009
(248) 593-6400

Attorneys for Cargill, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of September, 2014 the foregoing Motion to Dismiss with Prejudice was filed electronically and that service copies were sent by federal express and electronic mail to:

United Food & Commercial Workers
International Union, Local 324
8530 Stanton Ave
Buena Park, CA 90620

Robert A. Cantore, Esq.
Gilbert & Sackman
3699 Wilshire Blvd Suite 1200
Los Angeles, CA 90010
rac@gslaw.org

William M. Pate, Acting Regional Director
National Labor Relations Board, Region 21
888 S. Figueroa Street, 9th Floor
Los Angeles, California 90017
William.pate@nlrb.gov

Sylvia Meza, Field Examiner
National Labor Relations Board, Region 21
888 S. Figueroa Street, 9th Floor
Los Angeles, California 90017
Sylvia.Meza@nlrb.gov

Douglas M. Topolski

Exhibit 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

CARGILL, INC.[1] Employer and **UNITED FOOD & COMMERCIAL WORKERS UNION LOCAL NO. 324**[2] Petitioner	Case 21-RC-133636

DECISION AND ORDER

United Food & Commercial Workers Union Local No. 324 (Petitioner) filed the instant petition on July 28, 2014, seeking to represent all full-time and regular part-time packaging, shipping, and receiving employees employed by the Employer at its facility located at 566 North Gilbert Street, Fullerton, California for collective-bargaining purposes; excluding all other employees, packaging leads, shipping leads, office clerical employees, professional employees, staffing agency employees, guards and supervisors as defined in the National Labor Relations Act.[3]

The Employer contends that the petitioned-for unit is not an appropriate unit because it does not include the maintenance, terminal, and quality-control employees, who share a

[1] The Employer's name appears as amended at the hearing.
[2] The Petitioner's name appears as amended at the hearing.
[3] The Petitioner amended the unit description at the hearing.

community of interest with the petitioned-for employees. In addition, the Employer contends that the packaging and shipping leads are not supervisors as defined in the Act, and should also be included in the unit.

On August 12, 2014, a hearing in this matter was held before a hearing officer of the National Labor Relations Board (the Board), and the parties thereafter filed briefs. Pursuant to the provisions of Section 3(b) of the National Labor Relations Act (the Act), the Board has delegated its authority in this proceeding to me.

I. THE ISSUES AND SUMMARY

The issues are:

1. Whether the packaging, shipping, and receiving employees share an overwhelming community of interest with the maintenance, terminal, and quality-control employees, so as to be included in a single unit for purposes of collective bargaining.
2. Whether the packaging leads (Jaime Sedano and Rafael Rodriguez), the shipping lead (Raymond Ramirez), and a quality-control employee (Steve Lim), are supervisors under the Act. The Petitioner contends that they are supervisors as defined by Section 2(11) of the Act. The Employer contends that they are employees as defined in the Act, and should be included in the unit.

Based on the record in its entirety, I find that the packaging and shipping leads are not supervisors as defined in the Act, and should be included in any appropriate unit. Thus, I find that the petitioned-for unit is not an appropriate unit because it excludes the packaging and shipping leads. At the hearing, the Petitioner stated that it does not wish to proceed to an

election in any alternate unit if the unit sought by the Petitioner is deemed to be inappropriate. Therefore, I hereby dismiss the petition.[4]

FACTUAL BACKGROUND

A. Overview of the Employer's Operation

The Employer is engaged in the business of operating an oil processing facility in Fullerton, California.[5] Oil arrives at the facility in bulk via railcars or trucks. It is then stored, tested in a lab at the facility, certain oils are blended, and oil ultimately get packaged and shipped to customers. A total of 51 employees (including 3 leads) work in the following departments: terminal, quality-control, maintenance, packaging, shipping, and receiving.[6]

Terminal employees unload the oil from railcars or trucks, and transfer it to the appropriate tanks. The quality-control department (also known as the lab) is in charge of testing the oil each time it gets moved within the facility and after it gets blended. This department has four lab technicians who perform the analysis to test the oil. Various employees, including terminal employees, leads, and certain packaging employees, drop off oil samples at the lab for testing. The maintenance department currently consists of four mechanics responsible for repairing equipment in the facility, including equipment used by machine operators in the packaging department.

---

[4] Since the Petitioner does not wish to proceed to an election in any alternate unit, it is not necessary to rule on the issues of: (1) whether the packaging, shipping, and receiving employees share an overwhelming community of interest with the maintenance, terminal, and quality-control employees; and (2) whether Steve Lim, a quality-control employee, is a supervisor as defined in the Act.

[5] The parties agreed to a commerce stipulation: the Employer, a Delaware corporation, with a facility located at Fullerton, California, is engaged in the business of operating an oil processing facility. During the past 12 months, a representative period, the Employer, purchased and received goods valued in excess of $50,000 which goods were shipped directly to the Employer's Fullerton, California facility from points located outside the State of California.

[6] Eight employees work in the terminal, 4 in quality-control, 4 in maintenance, 23 in packaging, 9 in shipping, and 3 in receiving.

Packaging-department employees perform various tasks. There, employees operate one of four lines: one where oil is packed into 35 lb. jugs in a cardboard boxes; one where it gets packed as a 50 lb. cube; one where oil gets packed into 5-quart bottles; and a so-called OLE line where oil get packed in different types of smaller bottles. Among the packaging employees, some work as relievers, votator operators, filler operators, or depalletizers. Relievers are responsible for filling in and relieving anyone in the lines, votator operators operate a particular machine that adjusts the viscosity of the oil, filler operators operate the machines in the line, and depalletizers remove boxes from pallets. Other packaging employees use forklifts to move the packaged oil to a warehouse area.

Thereafter, the oil gets shipped out by employees in the shipping department. Shipping employees either load trucks with finished product or perform clerical work related to shipping.

The receiving department handles the purchase and receipt of raw materials. The purchaser coordinates the purchase of raw materials while the other receiving employees operate forklifts to unload and store the material at the facility.

Stephanie Puig ("Puig") is the supervisor of the terminal, packaging, shipping, and receiving departments. In those departments, Puig is responsible for issuing any necessary discipline. She is also involved in hiring for those departments. Employees go to her to request time off, and she approves vacation requests. She is also responsible for conducting performance appraisals for those employees.

B. Packaging Leads Jaime Sedano and Rafael Rodriguez[7]

There are two leads in the packaging department; Jaime Sedano ("Sedano"), first-shift lead, and Rafael Rodriguez ("Rodriguez"), the second-shift lead. Their duties are to monitor the

[7] Neither of these two leads testified at the hearing.

schedule for the lines in packaging. The record evidence is not clear as to what "monitoring" the packaging lines entails. The packaging leads also take oil samples to the lab. In addition, they monitor orders in the computer system and perform other computer functions. They can operate the machines in the packaging area.

1. Jaime Sedano

a. Transfer / Recommendation to transfer

The Petitioner presented Carlos Hernandez ("Hernandez"), a receiving-department employee, as a witness at the hearing. According to Hernandez, Sedano transferred him from the packaging department to receiving department about three months ago. In this regard, Hernandez testified that Sedano told him to "go and help at receiving" and left him there. Hernandez admitted that he does not know whether Sedano received instructions from someone else to transfer him. Hernandez testified that Sedano simply told him to "go help" in receiving.

At the hearing, the Petitioner also presented employee Carlos Alban ("Alban"), who testified that Sedano told him that Sedano was going to recommend him for his current position as purchaser in the receiving department. The record is not clear as to when this conversation took place.[8] According to Alban, Sedano was the purchaser before Sedano was promoted to be a lead. Alban testified that Sedano trained Alban for two weeks for the purchaser job sometime before the official announcement was made that Sedano was going to become the packaging lead. Alban further testified that Sedano told him, "You know what, I will put my word, you know, for you to be the purchaser."

At the hearing, Alban also stated that he submitted an application for this job, and that he was interviewed by Plant Manager Jesus Valadez, Project Engineer Linsay Farrell, and

[8] Alban has worked as a purchaser for about 7 months. Presumably, the conversation happened around that time. Prior to becoming a purchaser, Alban worked in another area at the facility.

Sedano. On cross-examination, Alban admitted that he does not know what weight was given to Sedano's recommendation in the decision to move him to his current position.[9]

b. Assignment of overtime

Employee Israel Ramirez testified that Sedano has sometimes told him that he has to come in on Saturday to work overtime, but that most of the time the Employer asks for volunteers to work overtime. On rebuttal, Puig testified that the overtime schedule is made by Kelli Stiver, the production scheduler. If production is running behind, Stiver consults with Puig to determine whether overtime is necessary to catch up. The Employer tries to give employees advance notice of overtime. However, when enough notice cannot be provided, the Employer will solicit volunteers. According to Puig, Sedano's only role in this process is to write down the names of those who volunteer, and submit them to her for approval of payroll.

c. Assignment of work

The only evidence of Sedano's involvement in the assignment of work was adduced by certain questions asked by the hearing officer during Puig's testimony. Puig testified that packaging leads have assigned other workers to do certain specific task such as to go dump reprocessed oil.

2. Rafael Rodriguez

As noted above, Puig testified that packaging leads (Sedano and Rodriguez) may assign employees to go dump reprocessed oil. There is no other evidence in the record specifically pertaining to Rodriguez's duties as a lead.

[9] Puig, who was not working at the facility during the time that Alban was hired as the purchaser, testified that she does not know who approved his transfer.

C. Shipping Lead Raymond Ramirez[10]

The shipping department has one lead, Raymond Ramirez ("Ramirez"). All employees in that department work the first shift. There are a few hours during the shift when Puig is not onsite, and shipping lead Ramirez monitors the operation of the department. The record contains limited evidence detailing what Ramirez does to monitor the department. This evidence primarily comes from Puig's testimony. For example, on cross-examination, Puig testified that if a fight breaks out among shipping employees when she is away, the shipping lead will call her. She will then decide whether anyone should be sent home.

During examination by the hearing officer, Puig testified that Ramirez has assigned others to do inventory checks. Inventory is routinely checked once the end of each month for accounting purposes, but Ramirez can assign someone to do an inventory check at other times if needed. Puig further testified that Ramirez can also assign employees to move product from one area of the warehouse to another. According to Puig, Ramirez spends much of his time on what the Employer calls "Idoc failures," which means correcting computer-system communication failures. There is no other evidence in the record describing Ramirez's duties.

D. Other Evidence Related to the Supervisory Status of Leads.

Employee Alban testified that he was initially hired to work at the Employer's facility as lead-temporary worker through a staffing agency two years ago. Alban testified that when he was a lead, he fired a worker "on the spot." The record does not indicate precisely when this happened. The worker that he fired was a temporary employee who got into a fight with another temporary worker. No further details of this incident were provided at the hearing.

[10] Raymond Ramirez did not testify at the hearing.

Alban also testified that when he worked as a lead, he was not referred to as a "Supervisor One." He claims that he first heard this phrase from a manager named Mike Mattingly[11] about two weeks prior to the hearing in this case. According to Alban, he and Mattingly were discussing the Union when Mattingly mentioned that the leads were considered level-one supervisors. No other employee testified that leads are known as "level-one supervisors," and no employees testified that they view their leads as supervisors.

ANALYSIS

A. Section 2(11) Supervisor Legal Frame Work

The Petitioner asserts that the packaging and shipping leads are statutory supervisors as defined by Section 2(11) of the Act. The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). Section 2(11) of the Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment.

Under Board and Supreme Court precedent, in order to be a statutory supervisor, an individual must have the authority to effectuate or effectively recommend at least one of the supervisory indicia enumerated in Section 2(11) of the Act, using independent judgment in the interest of the employer. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001)).

[11] The record is not clear as to who is Mike Mattingly. He was described by Alban as the plant manager's boss.

Supervisory status must be established by a preponderance of the evidence. *Oakwood Healthcare, Inc.*, supra at 694. Lack of evidence is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). "[W]henever the evidence is in conflict or otherwise inconclusive on particular indicia or supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Further, job descriptions and job titles are only paper authority and are not given any controlling weight by the Board. *Avante at Wilson, Inc.*, id.; *Training School at Vineland*, 332 NLRB 1412, 1416 (2000).

In the instant case, the Petitioner has failed to meet its burden in establishing the supervisory status of the packaging and shipping leads. None of the packaging and shipping leads were presented at the hearing to testify with respect to their day-to-day duties. Only three employee witnesses testified regarding the duties of the leads to whom they allegedly report, but their testimony lacked detail. The record in general is devoid of detailed evidence as to the responsibilities and duties of the leads. Instead the Petitioner relied largely on general conclusionary statements made by the employee witnesses, and limited testimonial evidence adduced by the Petitioner during Puig's cross-examination.

The Petitioner claims that the leads are referred to by the Employer as level-one supervisors. But, the only evidence presented to support this claim was Alban's testimony that Manager Mike Mattingly made a comment to that effect. This evidence is insufficient to prove

this allegation. Although the Petitioner presented four employee witnesses, none of them testified that the leads are known as level-one supervisors or that they view their leads as supervisors. Moreover, as the Petitioner correctly noted in its brief, supervisory status is determined by an individual's duties, not by his job title or classification. As discussed below, the record evidence regarding the leads' duties failed to establish that the leads are supervisors.

B. Packaging Lead Jaime Sedano

The Petitioner contends that the packaging leads are supervisors because they can assign employees to perform specific duties, assign employees to specific departments, and assign overtime.

However, the only evidence presented regarding the packaging leads' involvement in the assignment of work was through Puig's testimony when she stated that packaging leads can ask employees to go "dump reprocessed oil." No specific examples or direct evidence of work assignments by the packaging leads were presented. Without other evidence, the act of simply asking employees to dump oil does not rise to the level of independent judgment necessary to establish that the leads exercise the requisite statutory authority to assign or direct. Accordingly, the record evidence is insufficient to establish these indicia.

As to the alleged assignment of employees to specific departments, employee Hernandez testified that Sedano transferred him from the packaging department to the receiving department. But, the only other detail provided about Sedano's involvement in this transfer was that Sedano told Hernandez to "go help out in receiving." Hernandez admitted that he did not know whether Sedano was following instructions from someone above him. The record evidence does not establish who made the decision to transfer Hernandez, nor does it fully describe the extent of

Sedano's role in the transfer. Accordingly, this evidence is insufficient to show that Sedano and the other leads have authority to transfer or reassign workers to different departments.

The Petitioner also claims that leads can effectively make hiring recommendations. In this regard, employee Alban testified that before it was officially announced that Sedano was going to become a lead, Sedano trained Alban for the position of purchaser, a position held by Sedano before he became a lead. Alban testified that Sedano told him, "I will put my word, you know, for you to be the purchaser." It is not clear on the record whether Sedano made this statement before or after he became a lead. Alban admitted that he submitted an application for the purchaser position, and that he was interviewed by the plant manager along with a project engineer and Sedano. However, the record lacks any details regarding the alleged interview or the extent of Sedano's participation in it. Accordingly, without context and explanation, I cannot find that Sedano effectively made a hiring recommendation. [12]

Likewise, there is insufficient evidence to conclude that leads have authority to assign overtime. The only evidence presented in support of this claim is employee Israel Ramirez's testimony that Sedano has sometimes told him that he has to come in on Saturdays, but that now the Employer seeks volunteers most of the time. The Petitioner did not present any further details regarding the assignment of overtime. On rebuttal, Puig testified that the lead's role in scheduling overtime is to solicit and write down the names of employees who volunteer for overtime. Thus, the record evidence failed to establish that leads assign overtime. Where there is

[12] Nor can I conclude that the leads have authority to discharge employees as contended by the Petitioner. Although employee Alban testified that he fired a temporary employee when he was a lead sometime around one or two years ago, Alban provided very limited details of this event. Even if Alban exercised independent authority to discharge an employee, that would be insufficient to establish that the current leads at issue in this case (Sedano, Rodriguez, and Ramirez) have the authority to discharge.

inconclusive evidence, the party asserting supervisory status has failed to meet its burden. *Dean & Deluca New York, Inc.*, 338 NLRB at 1048.

The Petitioner did not present other evidence of Sedano's supervisor authority. Therefore I find that Petitioner failed to meet its burden to prove that Sedano is a supervisor as defined in Section 2(11) of the Act.

C. Packaging Lead Rafael Rodriguez

The only record evidence regarding the duties of packaging lead Rodriguez was testimony by Puig stating that packaging employees (Sedano and Rodriguez) can assign employees to go "dump reprocessed oil." For the reasons discussed above, this evidence is insufficient to establish that the packaging leads are statutory supervisors. Therefore, I find that the Petitioner failed to meet its burden to prove that Rodriguez is a supervisor as defined in Section 2(11) of the Act.

D. Shipping Lead Raymond Ramirez

The Petitioner suggests that leads are supervisors because they monitor the operations of their department and are accountable for their performance when Puig is away from the plant. Puig admitted that she is away from the facility during a portion of the shipping department's shift, and acknowledged that the shipping lead (Ramirez) monitors the department during this time. However, no evidence was produced by the Petitioner to explain what Ramirez does to "monitor" the department.

The only other evidence that was presented regarding Ramirez's duties was Puig's testimony that Ramirez can assign employees to do inventory checks or to move product from one part of the warehouse to another. This limited evidence suggests that these assignments are merely routine and ministerial. Thus, the evidence is insufficient to show that Ramirez exercised

any supervisory authority. Therefore, I find that the Petitioner failed to meet its burden to prove that shipping lead Ramirez is a Section 2(11) supervisor as defined in the Act.

CONCLUSION

Based on the entire record in this matter and in accordance with the discussion above, I find and conclude that:

1. The hearing officers' rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner did not meet its burden of establishing that the packaging and shipping leads are supervisors as defined in Section 2(11) of the Act. Therefore, the petitioned-for unit is inappropriate because it excludes the packaging and shipping leads.

5. Since the Petitioner does not wish to proceed to an election in any alternate unit if the petitioned-for unit was deemed to be inappropriate, I hereby dismiss the Petition.

ORDER

IT IS HEREBY ORDERED that the Petition in this matter, be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by September 25, 2014. The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov,[13] but may not be filed by facsimile.

DATED at Los Angeles, California, this 11th day of September, 2014.

Olivia Garcia
Regional Director, Region 21
National Labor Relations Board

[13] To file the request for review electronically go to www.nlrb.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlrb.gov.

Exhibit 2

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 21

In the Matter of:

Cargill, Inc., Case No. 21-RC-133636

Employer,

and

United Food & Commercial
Workers Union Local No. 324,

Petitioner.

Place: Los Angeles, California

Dates: August 12, 2014

Pages: 1 through 274

Volume: 1

OFFICIAL REPORTERS

AVTranz
E-Reporting and E-Transcription
845 North 3rd Avenue
Phoenix, AZ 85003
(602) 263-0885

leads and that Steve Lim are supervisors under the Act and maintains that they are employees under the Act.

Can the parties briefly restate their positions regarding the outstanding issues for the record? And whoever wants to go first.

MR. CANTORE: I will repeat the position that --

HEARING OFFICER MEZA: Okay.

MR. CANTORE: -- the leads are supervisors, that the packaging, shipping and receiving is an appropriate unit. And we also do not believe that one additional employee, Kimberly Cruz, is in the packaging unit even though she's listed here. She works in engineering, works on the other side of the tracks and I don't know why she's in packaging.

HEARING OFFICER MEZA: Okay. Wait. So are you raising a whole new issue at this time?

MR. CANTORE: I am saying we're going to challenge her when she votes.

HEARING OFFICER MEZA: Okay.

MR. CANTORE: Nothing more than that.

HEARING OFFICER MEZA: Okay. That's all you're saying?

MR. CANTORE: Yes.

HEARING OFFICER MEZA: Okay. All right. Okay. Anything else? Okay. Mr. Topolski?

MR. TOPOLSKI: Our -- our position hasn't changed since the beginning of the hearing. I believe that the Union -- that the

HEARING OFFICER MEZA: Off the record then?

MR. CANTORE: -- we want to go forward in another unit, and now he's having second thoughts. So why don't we --

HEARING OFFICER MEZA: Do we need to go off the record?

MR. CANTORE: We need to go off the record --

HEARING OFFICER MEZA: Okay.

MR. CANTORE: -- for a minute.

HEARING OFFICER MEZA: Off the record.

MR. CANTORE: That's fine.

(Off the record at 3:46 p.m.)

HEARING OFFICER MEZA: Okay. On the record.

Okay. So, Mr. Cantore, you were just discussing off the record whether you wanted to change your --

MR. CANTORE: I would not.

HEARING OFFICER MEZA: -- position on accepting an alternate unit. Okay. So, no?

MR. CANTORE: No.

HEARING OFFICER MEZA: Your answer's still the same? Okay. All right. Let's see here. Okay. So I think the last question was whether there's anything further the parties desire to present.

MR. CANTORE: And the answer's no.

MR. TOPOLSKI: The answer's no.

HEARING OFFICER MEZA: Okay. So both parties stated no.

And do the parties wish to waive the filing of briefs?

MR. CANTORE: No.

MR. TOPOLSKI: No.

HEARING OFFICER MEZA: Okay. And the briefs will be due -- briefs will be due on August 19th, 2014. And that's seven days from today, correct? All right.

Okay. Mr. Topolski, have all exhibits been offered?

MR. TOPOLSKI: Yes.

HEARING OFFICER MEZA: Okay. And, Mr. Cantore, have all exhibits --

MR. TOPOLSKI: Let's check the record.

HEARING OFFICER MEZA: -- been offered?

MR. TOPOLSKI: Exhibits 1 and 2 is all I have. I believe they've been offered and introduced, correct? Were they?

HEARING OFFICER MEZA: Yes. Okay.

MR. CANTORE: And all of mine, two exhibits?

HEARING OFFICER MEZA: Okay. So both Employer's Exhibit 1 and 2 have been received and Petitioner's Exhibit 1 and 2 have been received into the record. Okay. So if there is nothing further, the hearing will be closed.

MR. TOPOLSKI: Yeah.

MR. CANTORE: Yeah.

HEARING OFFICER MEZA: Hearing no response, the hearing is now closed.

(Whereupon, the hearing in the above-entitled matter was closed at 3:54 p.m.)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

CARGILL, INC.

Employer

and

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 324

Case No. 21-RC-136849

Petitioner

EMPLOYER'S REPLY TO UNION'S OPPOSITION TO MOTION TO DISMISS THE PETITION WITH PREJUDICE

Employer, Cargill, Inc. ("Employer" or "Cargill"), through undersigned counsel, respectfully replies to the Union's Opposition (attached hereto as Exhibit 3[1] and referred to herein as the "Opposition") to the Employer's Motion to Dismiss the Petition with Prejudice (hereinafter "Employer's Motion"). For the reasons discussed below, as well as those brought to the attention of Regional Director previously, the Employer's Motion to Dismiss the Petition with Prejudice should be granted. Additionally, the hearing scheduled for October 2, 2014 should be cancelled immediately.

ARGUMENT

The Employer's Motion establishes beyond any serious debate that the Board's Rules and Regulations, applicable legal principles, and the *Casehandling Manual* all require dismissal of the instant petition with prejudice. The Union's opposition confirms this conclusion. Indeed, the Union does not address, much less attempt to challenge, any of the sound legal principles and

[1] The Exhibit attached hereto is numbered to follow sequentially those attached to the Employer's Motion. The Union's Opposition is attached hereto because it was presented as letter attached to an e-mail. Thus, it is unclear whether the Opposition has been made a formal part of the record in this matter.

arguments advanced by the Employer. Instead, the Union relies upon nothing more than contradictory and internally inconsistent assertions to suggest that it should be permitted to re-litigate the issues it either raised and lost or waived in Case No. 21-RC-133636. The Regional Director should reject this transparent and unsuccessful attempt at obfuscation for what it is and dismiss the petition with prejudice.

Thus, the Union claims that "...it has not specifically excluded leads (or any other classification) from the petitioned for unit (as it did in Case No. 21-RC-133636)." Opposition at 2. This contention is misleading if it is not false. Immediately after making this assertion, the Union concedes that its defined exclusions to the unit set out in its petition contain, among others, "all other employees" (other than the packaging, shipping, and receiving employees it seeks exclusively in this case and sought exclusively in 21-RC-133636) and supervisors. It then goes on to opine that since the lead operators comprise less than 10% of the unit it seeks, "...the "standard" procedure would be to allow the leads to vote subject to the Union's challenge and wait and see if a determination needs to be made." Opposition at 3. Thus concludes the Union, "...the Region could and should simply allow the leads to vote subject to challenge by the Union." *Id.*

These representations make clear that the Union at this time is still is seeking only one unit consisting only of packaging, shipping and receiving employees. The Union expressly excludes "all others" and the lead operators because the Union still contends they are supervisors. There would be no other reason to suggest that leads vote subject to challenge if this was not the case. No amount of double talk can hide this unambiguous position.

Thus, the Union seeks in this case right now *exactly* the unit the Regional Director found *not appropriate* in Case No. 21-RC-133636. Exhibit 1. When the petition presents a unit that it

is not appropriate on its face, it must be dismissed. *Casehandling Manual* (CMH) Section 11011. Thus, and contrary to the Union's notion that the supervisory status of the leads "...doesn't have to be decided, at least not now (Opposition at 2)...", the Union's failure to concede expressly and immediately that the leads are not supervisors and are a part of any appropriate unit renders the petition defective on its face. Exhibit 1 and CMH section 11101. The Union should not be permitted any further opportunities to pursue its vexatious posture. This petition should be dismissed now and for this reason alone.

Moreover, and in any event, it does not matter what position the Union might ultimately take on any unit proposal in this proceeding. It had the opportunity to fully litigate all unit issues concerning its first request for an election at the Employer's Fullerton facility in Case No. 21-RC-133636. The Union let the matter proceed to a hearing. Even at the hearing, the Union was provided a recess to reconsider its position on the unit. It chose not to do so. At any time prior to the close of the hearing or an election agreement, it could have withdrawn its petition and sought to re-file without prejudice. *See* CHM Section 11111. It chose not to do so. Even after the Decision and Order was issued, the Union could have sought to reopen the record, move for reconsideration or file a request for review of the Regional Director's decision. It chose to do none of these things.

Thus, pursuant to the Board's Rules and Regulations, the decision of the Regional Director in Case No. 21-RC-133636 is now "final." 29 CFR Section 102.67(b). The petition in Case No. 21-RC-133636 is dismissed. This dismissal is correctly treated as one with prejudice. The *Casehandling Manual* makes clear that the purpose of dismissing a petition with prejudice is to avoid exactly what the Union is doing in this case. "The purpose of levying prejudice is to

conserve the Agency's resources by discouraging repetitive and duplicate filings." CMH section 11118.

The Union cannot be permitted to:

- consciously take a position at a representation hearing after being given multiple opportunities to alter that position;
- after that hearing has closed and the decision has been issued, file a new petition seeking to raise the same issues in the same unit at the same facility while intentionally declining to utilize the established procedures for seeking a review of the decision rendered in the first hearing;
- ignore the decision rendered in the first hearing in its entirety;
- and then brazenly contend that it is entitled to re-litigate the very issues it chose not appeal without the prescribed prejudice penalty for no other reason than it did not like the outcome of the first proceeding and has no viable grounds to challenge them.

It is not an overstatement to say that allowing the Union to do this in the circumstances of this case would make a mockery of the procedures for reconsideration and review set out in the Board's Rules and Regulations and Casehandling Manual. It would also constitute nothing less than an arbitrary and blatant denial of the Employer's constitutional due process rights. Further, allowing the Union to proceed in this case would also constitute a violation of Sections 3(b) and 9(c) of the Act which require the Board and those to whom authority is delegated in representation matters to act in accordance with the both the statute and the Board's regulations.

In the final analysis, the Union's claim that "it is certainly true that nothing prevents" the Union's instant petition is false. To the contrary, every applicable principle prevents the Union

from proceeding in this matter while it remains true that nothing permits or condones the Union's conduct. Thus, the Union literally offers nothing to refute these sound principles and conclusions:

- The Regional Director's Decision and Order in Case No. 21-RC-133636 is final in the absence of a proper challenge by the Union in the manner required by the Board's regulations;
- The Board's Rules and Regulations set out the exclusive methods for seeking reconsideration or review of the Regional Director's Decision and Order in Case No. 21-RC-133636;
- The Union did not seek reconsideration or review of the Regional Director's Decision and Order in Case No. 21-RC-133636;
- The Board's Rules and Regulations, policies and case law abhor and do not tolerate duplicative, repetitive, vexatious and piecemeal litigation;
- The Petition in Case No. 21-RC-133636 was properly dismissed with prejudice; and
- Allowing the Union to pursue its stated purpose of re-litigating exactly the same issues concerning the same unit with the same employer at the same location that it raised or could have raised in Case No. 21-RC-133636 just days after receiving a Decision and Order in that case violates the Board's Rules and Regulations, policies, statutory responsibilities, and the Employer's constitutional due process rights.

For these and all the reasons brought to the attention of the Regional Director, the instant petition should be dismissed immediately and with prejudice. Because the petition should be

dismissed, the hearing currently scheduled for October 2, 2014 should be cancelled immediately to avoid further waste of resources associated with this duplicative and vexatious proceeding.

CONCLUSION

For the reasons set forth above, as well as those brought to the attention of the Regional Director previously, the Employer's Motion to Dismiss the Petition with Prejudice should be granted. The petition should be dismissed with prejudice and Petitioner should not be permitted to file a petition for any election in a production and maintenance unit at Employer's Fullerton, California facility for a period of six months from the date of the Order dismissing this petition. Further, the hearing scheduled in this matter for October 2, 2014 should be cancelled.

Respectfully submitted,

/s/

Douglas M. Topolski, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1909 K. Street, N.W., Suite 1000
Washington, DC 20006
(202) 263-0242

Ruthie L. Goodboe, Esq.
Sarah M. Rain, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
34977 Woodward Avenue, Suite 300
Birmingham, MI 48009
(248) 593-6400

Attorneys for Cargill, Inc.

19049572.1

EXHIBIT 3

EXHIBIT 3

Gilbert & Sackman
A LAW CORPORATION

Established 1945
Robert W. Gilbert (1920-2001)
Kenneth J. Sackman (Retired)

Joseph L. Paller Jr. [1]
Robert A. Cantore [2]
Steven M. Rehaut
Laurie A. Traktman
Jay Smith [3]
Joshua F. Young

Michael D. Weiner
Ryan Spillers
Stephanie J. Joseph [4]
Sean M. Kramer
Travis S. West

3699 Wilshire Boulevard, Suite 1200
Los Angeles, CA 90010-2732
Telephone: 213.383.5600 323.938.3000
Fax: 213.383.1165 323.937.9139
www.gslaw.org

[1] Also admitted in NV, NY & PA
[2] Also admitted in NY
[3] Also admitted in AL
[4] Also admitted in MI & TN

September 25, 2014
Via Electronic and U.S. Mail

William Pate, Acting Regional Director
NLRB, Region 21
888 South Figueroa Street
Ninth Floor
Los Angeles, CA 90017-5455

Re: *Cargill, Inc.*
Case No. 21-RC-136849

Dear Acting Regional Director Pate:

Please consider this letter the response by Petitioner United Food and Commercial Workers, Local Union No. 324, UFCW, AFL-CIO ("Union") to the rather novel device employed by the Employer, Cargill, Inc. ("Employer"), to deprive its employees of their rights under section 7 of the National Labor Relations Act ("Act"), 29 U.S.C. § 157. Specifically, this letter is being sent in opposition to the motion by the Employer to dismiss the instant petition with prejudice, and thus prevent its employees from exercising their right to "join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing."

The Union notes at the outset that, although it ***may*** be true that "nothing [specifically] allows a petitioner to file a completely new petition while a petition filed by the same petitioner addressing the same issues in the same unit at the same employer facility is pending" (Employer's Motion at 7), it is ***certainly*** true that nothing prevents it. Thus, to accomplish its statutorily offensive goal of preventing an election in this case, the Employer has offered absolutely no precedent for the extraordinary relief it seeks. Instead, it has resorted to misstating the current procedural posture of the petition and twisting the Union's positions on issues.

> As this case now stands, the Union has petitioned for a unit consisting of:
>
> All full-time and regular part-time packaging, shipping, and receiving employees employed by the Employer at its facility located at 566 North Gilbert Street, Fullerton, California. (Emphasis added).

Essentially, the Union has petitioned for a traditional unit consisting of "***all*** employees" in the Employer's packaging, shipping, and receiving departments, and has sufficiently demonstrated an interest in this unit.

Admittedly, the Union has not identified ***any*** classification of "employees" that may (or may not) be included in the unit. Although this failure includes the lead classification, it also includes every other classification of employees working in the three departments. And the Union has ***not*** specifically excluded leads (or any other classification) from the petitioned-for unit (as it did in Case No. 21-RC-133636). Indeed, the exclusions from the unit as petitioned for by the Union in this case consist only of:

> All other employees, maintenance employees, terminal employees, quality-control employees, technical employees, staffing agency employees, office clerical employees, guards and supervisors as defined in the National Labor Relations Act. (Emphasis added).

Thus, contrary to the Employer's *ipse dixit* contention, the Union is not seeking to exclude leads from the petitioned-for unit. Indeed, ***if*** leads working in the packaging, shipping and/or receiving departments are "employees" (as the Employer contends they are), then they definitely are included in the petitioned-for unit. Admittedly, however, ***if*** leads are "supervisors as defined in the National Labor Relations Act" (as the Union contends), then they may be excluded. Thus, the real issue raised by the Employer's unorthodox motion is ***not*** whether the petition should be dismissed (there is absolutely no authority for such an outrageous result), but whether the Union should be allowed to raise the issue of the leads' supervisory status in this petition after having lost the issue in Case No. 21-RC-133636. And the answer to this question is, it doesn't have to be decided, at least not now.

What makes this petition different from any other petition is only the Regional Director's Decision and Order in Case No. 21-RC-133636, where she concluded that the Union had not met its burden of proving the supervisory status of the Leads. Absent

this decision, the "standard" procedure would be to count the number of employees in the petitioned-for unit and the number of individuals at issue. The Region would then decide whether their status needed to be decided before an election is held or afterwards (and then only if their votes could determine the outcome of the election). Given that the three leads at issue are less than 10% of the petitioned-for unit, the "standard" procedure would be to allow the leads to vote subject to the Union's challenge and to wait and see if a determination needs to be made.

But according to the Employer, the decision in Case No. 21-RC-133636 has precluded the Union from raising the issue of the supervisory status of the leads in this proceeding, and thus the petition must be dismissed. But why? One simply does not flow logically from the other.

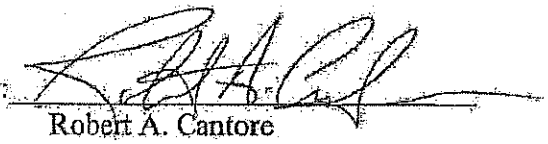
If the Region agrees with the Employer that the Union is precluded from raising the status of leads issue again, then the obvious solution would be to count any ballots they may cast in the election, ***not*** to dismiss the petition and deny all employees their section 7 rights. Besides, following proper briefing, the Region could decide that, for public policy reasons – such as those stated in Congress's decision to exclude supervisors (who may hire, fire and otherwise discipline employees or effectively recommend the same) from a unit of employees – and because this is not an adversarial proceeding, a decision based solely upon the failure to prove the issue of supervisory status should not bar raising the same issue in a subsequent proceeding, even if it involves the same union and the same employer. But perhaps most importantly, the Region need not make this decision now.

Given that today is the last day to seek review of the Decision and Order in Case No. 21-RC-133636 and that the Union has waived its right to seek review, there are only two possibilities left. By the time the Region considers the Employer's motion and this opposition, either the Decision and Order will have become "final" and the petition dismissed (*see* 29 CFR § 102.67(b)) or the Employer will have filed its own request for review of a issue that it won. If the former, the Region should simply proceed with the petition as it would with any other petition. If the latter, the Region should recognize the Employer's request for what it is, a baseless attempt to delay the election where the best it could hope to obtain on review would be a stronger statement by the Board that the Union had failed to meet its burden in the earlier proceeding. Under either scenario, the Region could and should simply allow the leads the opportunity to vote subject to challenge by the Union. Only if their votes could determine the outcome of the election would it then be necessary for the Region to resolve any of these novel issues.

In sum, there is absolutely no reason to delay the proceedings any longer, much less to dismiss the petition entirely.

Very truly yours,

Gilbert & Sackman, a Law Corporation

By: 
Robert A. Cantore

cc: Douglas M. Topolski, Esq.
Sylvia Mesa, Board Agent
Greg Conger
Andrea Zinder
Gilbert Davila

LWP1.324.wpd

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of September, 2014 the foregoing Employer's Reply to Union's Opposition to Motion to Dismiss the Petition with Prejudice was filed electronically and that service copies were sent by federal express and electronic mail to:

United Food & Commercial Workers
International Union, Local 324
8530 Stanton Ave
Buena Park, CA 90620

Robert A. Cantore, Esq.
Gilbert & Sackman
3699 Wilshire Blvd Suite 1200
Los Angeles, CA 90010
rac@gslaw.org

William M. Pate, Acting Regional Director
National Labor Relations Board, Region 21
888 S. Figueroa Street, 9th Floor
Los Angeles, California 90017
William.pate@nlrb.gov

Sylvia Meza, Field Examiner
National Labor Relations Board, Region 21
888 S. Figueroa Street, 9th Floor
Los Angeles, California 90017
Sylvia.Meza@nlrb.gov

/s/
Douglas M. Topolski

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

CARGILL, INC.

Employer

and

Case 21-RC-136849

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 324

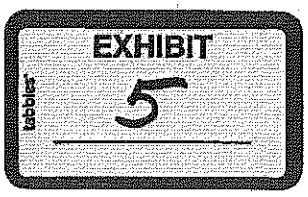
Petitioner

ORDER DENYING EMPLOYER'S MOTION TO DISMISS PETITION WITH PREJUDICE

On September 24, 2014, the Employer filed a Motion to Dismiss the Petition with Prejudice. On September 25, 2014, the Petitioner filed a letter in opposition to the Employer's motion, and on September 26, 2014, the Employer filed a Reply to Union's Opposition to Motion to Dismiss the Petition.

In its motion and its reply, the Employer contends that the unit sought in this matter is identical to the unit sought by the Petitioner in Case 21-RC-133636, and that dismissal of the instant petition is warranted because it was determined in Case 21-RC-133636 that the unit sought by the Petitioner was inappropriate. The Employer further contends that the Board's Rules and Regulations prohibit the Petitioner from filing a new petition concerning the same unit of the Employer's employees while the first petition is pending, and prohibit the Petitioner from filing a new petition to re-hear or re-open the record in Case 21-RC-133636, or to seek reconsideration of the Decision and Order in that case. The Employer also asserts that the new petition is an effort to litigate issues in an untimely or piecemeal fashion.

The petition in this matter was filed on September 16, 2014. The petition in Case 21-RC-133636 was filed by the Petitioner on July 28, 2014. In a September 11, 2014 Decision and Order, I dismissed the petition in Case 21-RC-133636, after concluding that the Petitioner did not meet its burden of establishing that the packaging and shipping leads it sought to exclude from the unit are supervisors as defined in Section 2(11) of the Act, and because the Petitioner



did not wish to proceed to an election in any alternate unit if the petitioned-for unit was deemed to be inappropriate.

Contrary to the Employer's contentions, dismissal of the instant petition is not warranted simply because it was determined in Case 21-RC-133636 that the petitioned-for unit was inappropriate or because, pursuant to the Board's Rules and Regulations, the Regional Director's decision is final. The Board's Rules and Regulations do not prohibit the filing of a petition while another petition concerning the same unit has been dismissed pursuant to a Decision and Order and during the period in which a request for review can be filed. In any event, no party requested review of the Decision and Order in Case 21-RC-133636, and that petition is no longer pending. Moreover, if a request for review of the Decision and Order in Case 21-RC-133636 had been filed, the instant petition would have been placed in abeyance and the hearing in this matter scheduled for October 2, 2014, would have been canceled.

Further, the instant petition does not constitute a request to re-hear or re-open the record in Case 21-RC-133636, or a request for reconsideration of the Decision and Order in that case, and the Board's Rules and Regulations in that regard do not apply here, where the Petitioner has filed a new petition and not a motion for reconsideration or a motion to re-hear or re-open the record in Case 21-RC-133636. Likewise, the Employer's argument that the instant petition is an effort to litigate issues in an untimely or piecemeal fashion is misplaced as that argument applies to the litigation of unfair labor practices, not the processing of petitions involving questions concerning representation.

While the Employer contends that the dismissal of the petition in Case 21-RC-133636 should be treated as a dismissal with prejudice and bar the filing of a petition concerning these employees for six months, there is no basis to dismiss a petition with prejudice in the Board's Rules and Regulations or the Board's *Casehandling Manual, Part Two, Representation Proceedings (Casehandling Manual)*. The Employer inappropriately relies on *Casehandling Manual* Section 11118 in support of prejudice arguments, but that section concerns prejudice as it applies to the withdrawal of a petition. No such prejudice applies when a petition is dismissed. Moreover, contrary to the Employer's contention, the Petitioner did not disclaim interest in any unit except the one sought in Case 21-RC-133636, but instead stated in that case that it did not wish to proceed to an election in any alternate unit if the it sought was deemed to be

inappropriate. Thus, this is not a situation where a petition has been withdrawn pursuant to an incumbent union's disclaimer of interest, and no prejudice to the filing of a new petition applies.

The Employer's argument that the instant petition should be dismissed under *Casehandling Manual* Section 11011 because it purportedly seeks a unit that is inappropriate on its face is also misplaced. While the petitioned-for unit is similar to that of the petitioned-for unit as amended at hearing in Case 21-RC-133636, it is not identical and I cannot conclude that the petitioned-for unit in the instant case is inappropriate on its face and that dismissal is warranted at this time.

Finally, for the reasons described above, I reject the Employer's arguments that refusing to dismiss the petition at this time constitutes a denial of due process or a violation of Sections 3(b) or 9(c) of the Act.

ACCORDINGLY, IT IS HEREBY ORDERED that the Employer's Motion to Dismiss the Petition with Prejudice is denied.

Dated: September 26, 2014

/S/OLIVIA GARCIA
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 21
888 S FIGUEROA ST FL 9
LOS ANGELES, CA 90017-5449

Exhibit 14

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

CARGILL, INC.[1]

Employer

and

Case 21-RC-136849

UNITED FOOD & COMMERCIAL WORKERS
UNION LOCAL NO. 324[2]

Petitioner

DECISION AND DIRECTION OF ELECTION

United Food & Commercial Workers Union Local No. 324 (Petitioner) filed the instant petition on September 16, 2014, seeking to represent all full-time and regular part-time packaging, shipping, and receiving employees employed by the Employer at its facility located at 566 North Gilbert Street, Fullerton, California; excluding all other employees, maintenance employees, terminal employees, quality-control employees, staffing-agency employees, office clerical employees, guards and supervisors as defined in the Act.[3]

The Employer contends that the petitioned-for unit is not appropriate because it does not also include the maintenance, terminal, and quality-control employees, who the Employer submits share the requisite community of interest with the petitioned-for employees.

In addition, and as explained in more detail below, also placed in dispute in this proceeding is the unit placement of four individuals (2 packaging leads; 1 shipping lead; and 1 quality-control employee). The Petitioner argues that these individuals are all supervisors

[1] The Employer's name appears as amended at the hearing.
[2] The Petitioner's name appears as amended at the hearing.
[3] The Petitioner amended the unit description at the hearing.

within the meaning of Section 2(11) of the Act. The Employer takes a contrary position, arguing that they are all statutory employees.[4]

On October 2, 2014, a hearing in this matter was held before a hearing officer of the National Labor Relations Board (the Board), and the parties thereafter filed briefs. Pursuant to the provisions of Section 3(b) of the National Labor Relations Act (the Act), the Board has delegated its authority in this proceeding to the undersigned.

I. Issues and Summary of Findings

A. Issues

1. Whether the packaging, shipping, and receiving employees share an overwhelming community of interest with the maintenance, terminal, and quality-control employees, so as to be included in a single unit for the purposes of collective bargaining.
2. Whether Jaime Sedano (packaging lead), Rafael Rodriguez (packaging lead), and Raymond Ramirez (shipping lead) are supervisors within the meaning of the Act.
3. Whether Steve Lim (quality-control employee) is a supervisor within the meaning of the Act.

B. Summary of Findings

Based on the record in its entirety, I find that:

1. The petitioned-for unit of packaging, shipping, and receiving employees is an appropriate unit. And the packaging, shipping, and receiving employees do not share an overwhelming community of interest with the maintenance, terminal, and quality-control employees so as to require the inclusion of these three classifications in the appropriate unit.

[4] The Employer also makes various procedural and/or due process arguments in support of its position that this petition should be dismissed in light of a prior petition involving these same parties, and the Decision and Order that I issued in that case resolving a similar supervisory issue. This subject will be discussed more infra.

2. The Petitioner failed to meet its burden of establishing that Jaime Sedano, Rafael Rodriguez, or Raymond Ramirez are supervisors within the meaning of the Act. Thus, these employees fall within the petitioned-for classifications of packaging employees and shipping employees, respectively.
3. Based on my findings that quality-control employees are not to be among the included classifications in the petitioned-for unit, it is unnecessary for me to decide whether or not quality-control employee Steve Lim is a supervisor within the meaning of the Act.

II. Brief overview of the Employer's operations

The Employer is engaged in the business of operating a food-grade oil-processing facility in Fullerton, California.[5] Oil arrives at the Employer's facility in bulk via railcars or trucks. It is then stored and tested in a lab at the facility. Certain oils are blended, and are ultimately packaged and shipped to customers.

In terms of layout, the Employer's facility has two distinct sides to it, which I will refer to as Side 1 and Side 2. Side 1 of the Employer's facility is where incoming oil is delivered, stored, and tested. The Employer's terminal employees, who unload and store the oil, and quality-control employees, who work in the lab, primarily work on Side 1.

Side 2, which consists of a single building, is where *processed* oil is packaged and shipped; and where raw materials that are used by the employees in the packaging department are purchased and received.

[5] The parties agreed to a commerce stipulation: the Employer, a Delaware corporation, with a facility located in Fullerton, California, is engaged in the business of operating an oil-processing facility. During the past 12 months, a representative period, the Employer purchased and received goods valued in excess of $50,000, which goods were shipped directly to the Employer's Fullerton, California facility from points located outside the State of California.

The Employer's packaging, shipping, and receiving employees work primarily on Side 2. The Petitioner is seeking a unit of these Side 2 employees.

The Employer also employs maintenance employees who do repairs. The maintenance office is on Side 1, but maintenance employees may perform work on either side of the facility.

A total of 51 employees (including the employees whose supervisory status is at issue) work in the classifications at issue, i.e. terminal, quality-control, maintenance, packaging, shipping, and receiving employees.[6]

III. Prior petition; Prior Decision and Order

On July 28, 2014, the same Petitioner as in this case filed a petition in Case 21-RC-133636. By that petition, the Petitioner sought to represent the following employees of the Employer:

> All full-time and regular part-time packaging, shipping, and receiving employees employed by the Employer at its facility located at 566 North Gilbert Street, Fullerton California; excluding all other employees, *packaging leads, shipping leads*, office clerical employees, professional employees, staffing-agency employees, guards and supervisors as defined in the Act (emphasis in italics added).

Note that the petitioned-for unit in the prior case is very similar to the petitioned-for unit in this case, although it is not identical. By the prior petition, the Petitioner sought to specifically exclude the classifications of packaging leads and shipping leads from the appropriate unit. The Petitioner took the position in that case that the leads occupying those positions are supervisors within the meaning of the Act. The Employer took a contrary position.

On August 12, 2014, a hearing was held in the prior case, during which the parties presented evidence on the supervisory issue. During the hearing, the parties also presented evidence with respect to the issue of whether the packaging, shipping, and receiving employees

[6] These employees are allocated as follows: 8 employees work in the terminal; 4 employees work in quality-control; 4 employees work in maintenance; 23 employees work in packaging; 9 employees work in shipping; and 3 employees work in receiving.

share an overwhelming community of interest with the maintenance, terminal, and quality-control employees, so as to be included in a single unit for purposes of collective bargaining, i.e. the same appropriate-unit issue raised in this case.

During the representational hearing in the prior case, the Petitioner took the position that it would not proceed to an election in any alternate unit.

On September 11, 2014, I issued a Decision and Order in that case, finding and concluding, in relevant part, that the Petitioner had failed to meet its burden of establishing that the packaging leads and shipping leads are supervisors within the meaning of the Act; and that they should therefore be included in the appropriate unit.

Because Petitioner had sought to exclude these leads, and also had stated it was unwilling in that case to proceed to an election in any alternate unit, I dismissed the petition. As a result of the dismissal, it was unnecessary for me to decide the other issue, i.e. the appropriate-unit issue.

The Petitioner did not file a request for review with the Board of my Decision and Order.

IV. Procedural issues involving the current petition; the Employer's Motion to Dismiss

As reflected above, the Petitioner, in this case, seeks a similar unit as to the unit in the prior case. Noteworthy, however, is that the petitioned-for unit in this case does not seek to specifically exclude the classifications of "packaging leads" or "shipping leads."

After the petition in this case was filed, but prior to the October 2, 2014 hearing on the issues in this case, the Employer filed a Motion to Dismiss ("Motion") the instant petition. Therein, the Employer raised various procedural or due process arguments in support of its position that the petition should be dismissed in light of the prior petition, and the Decision and Order. The Petitioner filed a Response to the Motion, and the Employer then filed a Reply.

By Order dated September 26, 2014, I denied the Employer's Motion. In my Order, I discussed in detail the various reasons why the Employer's Motion was without merit. For the reasons set forth therein, I concluded that neither the prior petition, nor the Decision and Order, foreclosed the Petitioner from filing and pursuing the instant petition, and the petitioned-for unit.

Since issuance of my September 26, 2014 Order, the Employer has continued to advance the same or similar procedural and due process arguments. To that extent, I reaffirm the findings and conclusions set forth in my September 26, 2014 Order.[7]

V. The supervisory status issue of the packaging leads and shipping leads in this case

In this case, the Petitioner has taken the position that it is unnecessary to resolve the supervisory status (unit placement) of the packaging leads and the shipping lead. Rather, Petitioner argues that these employees should be voted subject to challenge. Alternatively, the Petitioner argues that if the issue is to be resolved, that the employees in question will either fall within the petitioned-for inclusions, or the petitioned-for exclusions (supervisor).

During the October 2, 2014 hearing, the hearing officer placed the parties on notice that the supervisory status of these lead employees was an issue in dispute. The hearing officer also solicited the parties' positions as to the supervisory status of the leads.

Although the Employer argues that the Petitioner refused to take a position on this issue at the hearing, after careful review of the record of the October 2, 2014 proceeding, I find that the Petitioner did take a position on this issue. In this regard, the Petitioner argued that if I am to resolve the supervisory status of the leads, the Petitioner is of the view that the leads are

[7] Contrary to the Employer's suggestion in its post-hearing brief in this case, the Employer's request for special permission to appeal my Order (which was filed with and then (on October 2, 2014) denied by the Board, is not pending before me. Nevertheless, and to avoid any ambiguity or any additional procedural delays, to the extent such a request is in any way arguably before me, I deny it for the same reasons set forth in my September 26, 2014 Order.

"supervisors" within the meaning of the Act.[8] But the Petitioner nevertheless chose not to present any evidence in support of its position.[9]

In light of there being no new evidence introduced as to this issue in this case, I find, for the same reasons set forth in my September 11, 2014 Decision and Order, that the Petitioner has failed to meet its burden of establishing that the packaging leads and shipping lead are supervisors within the meaning of the Act. As such, these leads properly fall within the included classifications of packaging employees and shipping employees, respectively, and are therefore eligible to vote in the election to be held in this case.

VI. Appropriate-unit issue

Earlier in this decision, I provided an overview of the Employer's operations, and set forth the classifications at issue, for the purposes of deciding the appropriate-unit issue in this case. Below is my discussion of the record evidence, as it relates to these classifications of employees and their terms and conditions of employment.

A. Terminal Employees

Terminal employees receive and unload the oil from railcars or trucks, and then transfer it to the appropriate storage tanks. Before unloading the oil, terminal employees will first take samples of the oil to the lab, where the quality-control employees work, for testing, to make sure that the oil meets appropriate specifications. Terminal employees also appear to be tasked with handling the bulk oil load-out, i.e. bulk oil that is received, and then sent out without being processed or packaged. The record reflects that terminal employees may also be called upon to help employees in the engineering department.

---

[8] Inasmuch as I find that the Petitioner did take a position on this issue, I reject Employer arguments to the contrary; and similarly deny the Employer's Motion to Strike portions of the Petitioner's post-hearing brief regarding the issue.

[9] During the October 2, 2014 hearing, the parties stipulated that I am to take administrative notice of the record in the prior case (21-RC-133636) in determining the appropriateness of the sought after unit in this case.

The record makes clear that the terminal employees' work is done almost exclusively on Side 1 of the Employer's facility. The terminal employees have minimal to no interaction with the packaging, shipping, or receiving employees on Side 2. Any interaction is either incidental or not substantial.

B. Quality-Control Employees

The quality-control department (lab) and employees working therein are in charge of testing the oil each time it is moved within the facility, and after it is blended. This department has four lab technicians who perform the analysis to test the oil.

Various employees, including terminal employees, as well as packaging leads and certain other packaging employees, drop off pre-labeled oil samples at the lab for testing.

For the most part, and when dropping off a sample, the person dropping off the sample may speak briefly with the lab technician (i.e. answer some questions), and complete paperwork. The person will then leave and return to performing their regular duties.

Steve Lim works in the quality-control department. His title is Technician III. His duties include calibrating the instruments used in the lab, and doing analysis of the samples. It appears from the record that he primarily works in the lab, doing analysis with the other quality-control employees, but he will also occasionally go to Side 2 to perform some duties.

In this regard, Lim, on a periodic basis, escorts a rabbi throughout the Employer's facility to ensure compliance with kosher standards, which conduct includes going over to Side 2. The record also reflects that Lim does inspections in the packaging department to determine if sanitation standards are being complied with. He reports his findings on this issue to a supervisor (Stephanie Puig, discussed infra). Lim also picks up paperwork in the packaging department about once per week.

The record reflects that another quality-control employee will also go to the packaging department on Side 2 to check the lines, and does this about once a week. However, the record reflects that the quality-control employees primarily do analysis work in the lab, and do not often go over to Side 2.

With respect to Lim, and the other quality-control employees, the record evidence reflects that any interaction that they have with the packaging, shipping, or receiving employees is minimal or insubstantial.

C. Maintenance Employees

The maintenance department, which has an office located on Side 1, currently consists of four mechanics responsible for repairing equipment in the facility, including equipment used by machine operators in the packaging department on Side 2. At least one maintenance-department employee is in charge of scheduling work orders, and this is done from the maintenance office.

The maintenance department stores its equipment and tools in the maintenance office. The maintenance department has a purchaser position, which appears to be currently vacant, and this person purchases the equipment and supplies needed by mechanics.

If called upon to perform repairs on packaging-department equipment, the record reflects that mechanics will ask packaging-department operators or a lead person what happened. There does not appear to be much interaction beyond this questioning.

Although the maintenance office is located on Side 1, it appears that sometimes deliveries meant for the receiving department on Side 2, are misdelivered to Side 1. Also, it appears from the record that additional storage space for packaging-department supplies is provided for in the maintenance office, or nearby, on Side 1.

With respect to the maintenance employees, the record evidence reflects that any interaction they have with packaging, shipping, or receiving employees is minimal or insubstantial.

D. Packaging-Department Employees

As noted above, some of the oil delivered to the Employer's facility is processed and packaged. Processed oil arrives at the packaging department through a pipeline that extends from Side 1 to Side 2.

Packaging-department employees perform various tasks. There, employees operate one of four lines: one line where oil is packed into 35-pound jugs in cardboard boxes; one line where it is packed as a 50-pound cube; one line where oil gets packed into 5-quart bottles; and finally a so-called OLE line, where oil is packed in different types of smaller bottles.

Among the packaging-department employees, some work as relievers, votator operators, filler operators, or depalletizers. Relievers are responsible for filling in for and relieving anyone on the lines, or any forklift drivers; votator operators run a particular machine that adjusts the viscosity of the oil; filler operators run the machines on the line; and depalletizers remove boxes from pallets and place them on a conveyor to the filler. Other packaging employees clean equipment, or drive forklifts to move the packaged oil to a warehouse area.

The packaging-department employees work in the same building on Side 2 as the shipping and receiving employees. The record reflects that at least one packaging-department employee (forklift driver) helps perform forklift duties in the receiving department. Packaging leads work on the lines, monitor the line schedules, and takes samples to the lab. The primary work area for these leads is Side 2.

The record reflects that votator operators have some limited interaction with terminal employees, with regard to oil being shipped out in bulk, but that that interaction is not substantial.

E. Shipping-Department Employees

After the oil has been packaged, it goes to the shipping-department area on Side 2. There, the oil is shipped out to customers by employees in the shipping department.

Shipping-department employees either load trucks with finished product or perform clerical work (e.g. scheduling the trucks, checking-in the trucks upon arrival, etc.) related to shipping. The shipping lead, Raymond Ramirez, works on computers.

F. Receiving-Department Employees

The receiving department (a purchaser and forklift drivers) handle the purchase and receipt of raw materials that are to be used by the packaging-department employees. The department, including the purchaser's office, is located on Side 2.

The purchaser coordinates the purchase of raw materials for the packaging-department employees. The record reflects that the purchaser also purchases some supplies that are used by the shipping department.

The purchaser also keeps track of inventory, and will walk through the areas where the receiving department, packaging department, and shipping department are to analyze inventory.

The other receiving-department employees operate forklifts to unload and store the delivered material at the facility – also on Side 2. The purchaser also helps with these forklift duties. The record reflects that at least one receiving-department employee has helped perform work on the packaging lines.

For the most part, the raw materials for the packaging department are delivered by vendors to the receiving department on Side 2. However, and as noted above, sometimes there are misdeliveries to Side 1; and there is additional storage space provided on Side 1.

G. Employees in the Packaging, Shipping, and Receiving Departments

The record reflects, because they work in and take breaks in the same building on Side 2, that the employees in the packaging, shipping, and receiving departments generally know each other. These employees are not as familiar with the terminal, maintenance, or quality-control employees. One witness testified that he refers to all of Side 2 as packaging.

As described above, the record also reflects that employees within these departments (packaging, shipping, and receiving) have periodically helped perform work in each other's departments. The packaging, shipping, and receiving employees all make generally the same wage rate, and receive the same benefits. The packaging and receiving departments each have forklift drivers, and these forklift drivers must have the appropriate certifications.

The Employer is currently implementing a new computer program at its facility, and has "super-users" who are tasked to train employees on its use. One such "super-user" is in charge of assisting the employees in the packaging, shipping, and receiving departments in this regard.

H. Stephanie Puig

Stephanie Puig ("Puig") is the supervisor of the terminal, packaging, shipping, and receiving departments. In those departments, Puig is responsible for issuing any necessary discipline. She is also involved in hiring for those departments. Employees go to her to request time off, and she also approves vacation requests. She is additionally responsible for conducting performance appraisals for employees in those departments.

The record reflects that although Puig currently supervises all four departments, the Employer has had, at times in the past, a separate supervisor for the terminal employees.

Puig was the Employer's primary witness at the hearing, and was able to provide testimony about the terms and conditions of employment for the employees she supervises. Because she does not supervise them, she was unable to provide detailed information or answer certain questions relevant to the terms and conditions of employment of the mechanics or the quality-control employees.

VII. Analysis of the appropriate-unit issue

The Board's traditional approach for determining the appropriateness of a bargaining unit is to begin by examining the petitioned-for unit. The Board will first assess whether the petitioned-for unit is identifiable as a group and then assess whether those employees share a community of interest using traditional criteria, in order to determine whether the petitioned for bargaining unit is appropriate.

The general community-of interest test utilized by the Board includes evaluation of such factors as functional integration; frequency of contact with other employees; employee interchange; degree of skill and common functions; commonality of wages, hours, and other working conditions; and shared supervision. *Publix Super Markets, Inc.,* 343 NLRB 1023, 1024 (2004).

The continued use of this test was reiterated in *Specialty Healthcare*:

> "In making the determination of whether the proposed unit is an appropriate unit, the Board's 'focus is on whether the employees share a 'community of interest.'" *NLRB v. Action Automotive, Inc.* 469 U.S. 490, 491 (1985). In determining whether employees in a proposed unit share a community of interest, the Board examines: 'whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange

with other employees; have distinct terms and conditions of employment; and are separately supervised.'" 357 NLRB No. 83, slip op. at 9 (August 26, 2011), quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002).[10]

A bargaining unit need not be the only appropriate unit, or the ultimate unit, or the most appropriate unit. The Act requires only that the unit be appropriate to ensure the fullest freedom in exercising the rights guaranteed by the Act. *Bartlett Collins Co.*, 334 NLRB 484 (2001). There is typically more than one way to group employees for purposes of collective bargaining. *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422-423 (4th Cir. 1963), cert. denied 376 U.S. 966 (1964).

If the petitioned-for unit is shown to be an appropriate bargaining unit, under *Specialty Healthcare* the burden shifts to the Employer to demonstrate that the additional employees it seeks to include share an overwhelming community of interest with the petitioned-for employees. If the Employer can meet this burden, the Board finds the petitioned-for unit to be inappropriate.

A. The petitioned-for unit is readily identifiable

Each of the classifications in the petitioned-for unit (packaging employees, shipping employees, and receiving employees) are readily identifiable as groups. The record at the hearing established that the Employer operates its business in a manner that clearly defines and differentiates between these classifications of employees, and the work functions that they perform. Specifically, these groups are clearly defined by department, the type of work they are assigned to within each department, and the location where they perform their work.

The employees are similarly clearly distinguishable from the Employer's other groups at issue (terminal employees, maintenance employees, and quality-control employees), in that they

[10] Contrary to the Employer's arguments, I find that *Specialty Healthcare* is valid Board law, and is applicable in resolving the appropriate-unit issue herein.

work in different departments, perform different job duties, and perform work in different locations of the Employer's facility.

B. The petitioned-for unit shares a community of interest

The record also establishes that the petitioned-for bargaining unit of packaging employees, shipping employees, and receiving employees do share a community of interest based on the functional integration of these groups of employees. In this regard, they share the common goal of packaging and shipping the processed oil.

These employees also all work in the same building on Side 2 at the Employer's facility. In addition, the record establishes daily interaction between these groups of employees, and some cross-over duties within departments. They also share the same supervisor, have similar wage rates, and receive the same benefits.

Based upon my finding that the petitioned-for bargaining unit constitutes a readily identifiable group and my further finding that the petitioned-for unit shares a community of interest separate from the Employer's other employees, I find that the petitioned-for bargaining unit is an appropriate bargaining unit for the purposes of collective bargaining.

C. The Employer has failed to carry its burden under *Specialty Healthcare*

Having concluded that employees in the petitioned-for unit are readily identifiable as a group and that they possess a community of interest separate from other employees, I turn to the question of whether the additional employees (terminal employees, maintenance employees, and quality-control employees) share an overwhelming community of interest with the employees in the packaging, shipping, and receiving departments, therefore requiring a finding that there is no legitimate basis to exclude them from the unit.

An overwhelming community of interest exists where the unit sought "fractures" an appropriate unit, seeking only an "arbitrary segment" of that unit and there is no rational basis for including some classifications, but excluding others. *Odwalla, Inc.*, 357 NLRB No. 132 (2011), slip op. at 5; *Specialty Healthcare*, slip op. at 13. *The Neiman Marcus Group, Inc. d/b/a/ Bergdorf Goodman,* 361 NLRB No. 11 (2014).

I find that the record herein does not support a finding that these other groups of employees share an overwhelming community of interest with the Employer's employees in the packaging, shipping, and receiving departments.

Here, the Employer failed to establish at hearing that there is any significant interaction or any meaningful or significant level of interchange between the disputed groups of employees. The disputed groups perform different and distinct job duties from those in the petitioned-for unit; and they are, for the most part, physically separated from one other during the workday. Moreover, and with the exception of terminal employees, they do not share a common supervisor.

For these reasons, I find that the Employer has failed to meet its burden under *Specialty Healthcare*.[11]

CONCLUSION

Based on the entire record in this matter and in accordance with the discussion above, I find and conclude that:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

[11] As such, it is unnecessary for me to decide whether or not quality-control employee Steve Lim is a supervisor within the meaning of the Act.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.[12]
5. I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining:

Included:	All full-time and regular part-time packaging, shipping, and receiving employees employed by the Employer at its facility located at 566 North Gilbert Street, Fullerton, California.
Excluded:	All other employees, maintenance employees, terminal employees, quality-control employees, staffing-agency employees, office clerical employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the **United Food & Commercial Workers Union Local No. 324.** The date, time, and place of the election will be specified in the notices of election that the Board's regional office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period that ended immediately prior to the date of this Decision, including employees who did

[12] The parties stipulated, and I find, that there is no contract bar to this proceeding.

not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause during the stipulated voter eligibility period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit Lists of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the regional office an election eligibility list, containing the full names and addresses of all eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). To speed both preliminary checking and the voting process, the names on the lists should be alphabetized (overall or by department, etc.). I shall, in return, make the list available to all parties to the election.

To be timely filed, the list must be received in the regional office on or before November [], 2014. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list.

Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the regional office by electronic filing through the Agency's website, **www.nlrb.gov**,[13] by mail, or by facsimile transmission at (213) 894-2778. The burden of establishing the timely filing and receipt of the lists will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **four** copies of the list, unless the list is submitted by facsimile or e-mail, in which only **one** copy of each list need be submitted. If you have any questions, please contact the regional office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so stops employers from filing objections based on nonposting of the election notice.

[13] To file the eligibility list electronically, go to www.nlrb.gov , select **File Case Documents**, enter the NLRB Case Number, and follow the detailed directions.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by November 12, 2014. The request may be filed electronically on the Agency's website, www.nlrb.gov,[14] but may not be filed by facsimile.

DATED at Los Angeles, California, this 29th day of October, 2014.

Olivia Garcia
Regional Director, Region 21
National Labor Relations Board

[14] To file the request for review electronically go to www.nlrb.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Exhibit 15

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 21-RC-136849

CARGILL, INC.,

Employer,

and

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL No. 324

Petitioner.

EMPLOYER'S REQUEST FOR REVIEW TO THE NATIONAL LABOR RELATIONS BOARD

Prepared by:

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

Douglas M. Topolski
Daniel A. Adlong

Counsel for Cargill, Inc.

1909 K Street, N.W., Suite 1000
Washington, DC 20006
(202) 263-0242
(202) 887-0866 (Fax)

695 Town Center Drive, Suite 1500
Costa Mesa, CA 92626
(714) 800-7902
(714) 754-1298 (fax)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CARGILL, INC.,	)	
Employer,	)	
and	)	Case No. 21-RC-136849
UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL NO. 324	)	
Petitioner.	)	

EMPLOYER'S REQUEST FOR REVIEW TO THE NATIONAL LABOR RELATIONS BOARD

Pursuant to Section 102.67 of the Rules and Regulations of the National Labor Relations Board (the "Board"), Cargill, Inc. ("Cargill" or "Employer"), files this Request for Review of the Decision and Direction of Election issued on October 29, 2014, by the Regional Director for Region 21 (hereinafter "DD&E"). Ex.1. This Request should be granted based upon the following grounds:

- Substantial questions of law and policy are raised because of the absence of officially reported Board precedent related to arguments set forth herein concerning the interpretation and enforcement of the Board's Rules and Regulations and decisions as they apply to the requirements for challenging Regional Directors' decisions and orders in representation matters after a hearing has been closed and the penalties for failing to follow required procedures.
- The Regional Director's decisions on substantial factual issues concerning unit determination issues are clearly erroneous and prejudicially affect the rights of the Employer.

- Rulings made in connection with this proceeding have resulted in prejudicial error.
- There are compelling reasons for reconsideration of an important Board policy as announced in *Specialty HealthCare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (August 26, 2011).

I. BACKGROUND AND BASIC OVERVIEW

This matter began when the Petitioner United Food and Commercial Workers Union Local No. 324 (the Petitioner" or the "Union") sought an election in an inappropriate unit of a portion of the production and maintenance employees employed by Cargill at its Fullerton, California facility ("the Facility"). Ex. 2 (Petition filed in Case No. 21-RC-133636 on July 28, 2014). Specifically, the Petitioner sought a unit of only packaging, shipping and receiving employees, excluding all leads as statutory supervisors. *See* Ex. 3, Decision and Order ("D&O") in Case 21-RC-133636 (decided September 11, 2014) at 1–2. After a hearing on August 12, 2014, the first petition was properly dismissed. Succinctly stated, the Union failed to prove that certain lead operators and employees were statutory supervisors and refused to proceed in any unit that included them. *See* Ex. 2 at 13–14.

The Union did not file a request to review the D&O as required by the Board's Rules and Regulations. Instead, the Union filed the petition in this matter seeking the same unit that was the subject of the dismissed petition. Ex. 4.

The Employer moved to dismiss this petition on the grounds that Board law requires a six month prejudice period before refiling a petition for the same or similar unit that was the subject of a petition being dismissed after a hearing concluded. *See* Exs. 5–7. The Regional Director denied the Employer's Motion. Ex. 8.

Another brief unit hearing was held on October 2, 2014. The Petitioner continued to claim, upon nothing more than exactly the same evidence rejected in the first hearing, that the same lead operators and employees were statutory supervisors notwithstanding the Regional Director's un-reviewed and final conclusion after the first hearing to the contrary. *See* Ex. 9, October 2, 2014 Tr. at 5–7 and 13; *see also* Ex. 10, Petitioner's Post Hearing Brief at 14–18.

The parties filed post hearing briefs addressing the Petitioner's request for an election in the inappropriate segment of the integrated production and maintenance unit at the Facility. Exs. 10 and 11. The Employer also filed a Motion to Strike or To Dismiss the Petition on October 13, 2014, on the grounds that on October 2, 2014, the Union confirmed that it continued to seek the same unit that was the subject of the dismissed petition. Ex. 12.[1]

The Regional Director nevertheless issued a Decision and Direction of Election in an inappropriate portion of the Facility's production and maintenance unit. This Request for Review follows.

II. ISSUES

- Whether the election in this matter currently scheduled for December 4, 2014, should be cancelled and the petition in this matter dismissed because the petition is barred by the six month prejudice period resulting from dismissal of the petition in 21-RC-133636.
- Whether *Specialty HealthCare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (August 26, 2011), should be overruled and the Board should return to its traditional community of interest test.

[1] On October 1, 2014, the Employer also filed a request for special permission to appeal ruling failing to grant the motion to dismiss. Ex.13.

- Whether *Specialty HealthCare* should be applied in cases where a petitioner seeks to fragment an integrated production and maintenance unit.
- Whether, if *Specialty HealthCare* is applicable, the Regional Director erred by concluding that terminal, quality control and maintenance employees do not share an overwhelming community of interest with employees in the unit sought by the Petitioner.

III. THE ELECTION SCHEDULED IN THIS MATTER SHOULD BE CANCELLED AND THE PETITION SHOULD BE DISMISSED

A. Relevant Facts and Procedural History

The Petitioner filed its first petition addressing the Facility on July 28, 2014, in Case No. 21-RC-133636. Ex. 2. After changing its position several times, the Petitioner stated at the unit determination hearing that it would proceed only in a unit of all full time and regular part time packaging, shipping, and receiving employees. Ex. 14, 21-RC-133636 August 12, 2014 Hearing Transcript (August 12, 2014 Hearing Tr.) at 271–72. The Petitioner contended that lead operators and employees should be excluded because they were supervisors within the meaning of Section 2(11) of the National Labor Relations Act ("the Act"). *E.g.*, Ex. 14, August 12, 2014 Hearing Tr. at 11. The Employer sought to include all lead operators and employees as well as terminal, quality control, and maintenance employees. *Id.* at 15.

A hearing to resolve these issues took place on August 12, 2014. Near the end of this hearing, which lasted almost a full day, the Petitioner was asked specifically if it wanted to change its position as to whether lead employees were statutory supervisors. It was granted a recess specifically to consider this question. Ex. 14, August 12, 2014 Hearing Tr. at 271–72. After being given all the time it wanted to define its position, and after being given every opportunity to present all the evidence it wanted to introduce, the Petitioner clearly stated its

conclusion. When asked after the recess if it wanted to change its position that it would proceed to an election only in a unit of packaging, shipping, and receiving employees without lead operators and employees (*see* Ex. 14, August 12, 2014 Hearing Tr. at 270), the Petitioner said simply "No." Ex. 14, August 12, 2014 Hearing Tr. at 272.

Upon the record established at the hearing, the Regional Director concluded in the D&O that the Petitioner had failed to meet its burden of showing that the lead operators and employees were 2(11) supervisors. Ex. 3 at 13–14. Thus, the Regional Director correctly concluded that the unit sought by the Petitioner was not appropriate. *Id.* at 13. Since the Petitioner expressly disclaimed interest in proceeding in any unit other than the one it demanded that excluded the lead operators and employees, the Regional Director properly dismissed the petition. *Id.* at 13–14.

The Petitioner did not file a Request to Review the D&O. Instead, it responded by filing a second petition in this Case on September 16, 2014. Ex. 4. The Petitioner again sought a unit of only all full time and regular part time employees in the packaging, shipping, and receiving departments. The Petitioner refused to concede that lead operators in these departments must be part of any appropriate unit as determined by the Regional Director in Case No. 21-RC-133636. *E.g.* Ex. 9, October 2, 2014 Tr. at 17 and Ex. 10 at 14–18. Thus, the petition in this matter seeks exactly the same unit already found inappropriate in Case No. 21-RC-133636.

The Employer informed the Region of its position concerning the second petition by e-mail on September 17, 2014. The Employer correctly observed that the unit sought by the Petitioner was inappropriate by definition because the Petitioner refused to include the lead employees that the Regional Director just days before said must be included in any appropriate unit. This alone required dismissal of 21-RC-136849. Second, the Employer correctly observed

that the Petitioner had expressly disclaimed interest in any unit except the one upon which it insisted at the hearing. Therefore, the dismissal in Case No. 21-RC-133636 should be treated as one with prejudice, barring the Petitioner from filing any petition concerning the Facility's production and maintenance employees for 6 months.

The Employer was informed by e-mail on September 23, 2014, that notwithstanding uncertainty about whether Employer's witnesses might be available, and the fact that the petition should be dismissed as a matter of law, a hearing was scheduled in this matter for October 2, 2014. The Employer filed a motion to dismiss the petition the next day. Ex. 5.

The motion made four points. First, it correctly stated that the only way provided by Board's Rules and Regulations to challenge a Regional Director's final unit determination made after the close of a hearing was by filing a Request for Review. *Id.* at 4 *citing* 29 CFR § 102.67(b) and (c). Second, the Petitioner could not use the second petition as a way to improperly reopen the record or request reconsideration of issues decided in Case 21-RC-133636 because it did not have the required grounds to do so. *Id.* at 5–6, *citing* 29 CFR § 102.65(e)(1). Third, the Board does not condone piecemeal litigation in multiple proceedings when issues were or could have been raised in prior proceedings. *Id.* at 6, *citing Jefferson Chemical Co., Inc.*, 234 NLRB 992 (1972)(Board will not condone piecemeal litigation of ULP claims); *Peyton Packing Co., Inc.*, 129 NLRB 1358 (1961)(same). Finally, the Board's Case Handling Manual requires dismissal of a petition seeking a unit that is inappropriate on its face and further requires a six month filing penalty when a petition seeks the same or similar unit as a petition that has been dismissed. Ex. 5 at 7–8 *citing* Case Handling Manual Part Two Representation Proceedings (CHM) §§ 11011 and § 11112.1(a). The Petitioner's letter in Opposition did not address any of these points. Ex. 6.

The Regional Director denied the Motion to Dismiss on the same day the Employer filed its reply. Exs. 7 and 8. The Regional Director stated that the Board's Rules and Regulations do not prohibit the filing of a second petition seeking the same unit as a dismissed petition while the period for requesting review in the first matter remains open. Ex. 8 at unnumbered page 2. The Regional Director also stated the petition could not be considered a request to reconsider or re-open the record in Case 21-RC-133636 because it was a new petition, completely ignoring the undisputed fact the Petitioner sought to re-litigate the very issues decided in case 21-RC-133636, including whether the lead employees were supervisors. *Compare* Ex. 3 at 13–14 with 8 at unnumbered page 2. The Regional Director also stated that the prejudice period required by the CMH was not applicable because the petition was dismissed as seeking an inappropriate unit after a hearing rather than being withdrawn. Ex. 8 at unnumbered page 2. Finally, without explanation and with complete disregard of the indisputable fact that the two petitions sought the same units including exclusion of the lead employees which the same Regional Director had found inappropriate just days before, the Regional Director stated that she could not conclude that the two petitions sought identical units and that the latter should be dismissed for this reason. *Id.* at unnumbered page 3.

Any doubt about whether the two petitions sought identical units was dispelled at the hearing on October 2, 2014. At first, the Petitioner refused to take a position on the lead employees. Ex. 9, Tr. 2 at 10–11. Later, however, the Petitioner clearly asserted that it maintained the position that the lead employees were statutory supervisors. "We have consistently taken the position in the previous case then this case that they [lead employees] are statutory supervisors. We have not changed that position." *Id.* at 13. The Petitioner then went on

to ask the Regional Director to reconsider her previous decision as to whether the lead employees were supervisors. *Id.*

Based upon this stated record position, as well the Petitioner's post hearing brief arguing again that the leads should be excluded as supervisors, *e.g.* Ex. 10 at 6, 16–17, on October 13, 2014, the Employer filed a Motion to Strike portions of the Petitioner's Brief or Alternatively to Dismiss the Petition with prejudice. Ex. 2. Again, it was clear beyond any debate that the Petitioner was seeking exactly the same unit it sought in the petition dismissed after a hearing in Case 21-RC-133636. For all the reasons already raised by the Employer, the Employer correctly stated in its Motion that the Regional Director should dismiss this matter with prejudice. This Motion was not opposed by the Petitioner.

Nevertheless, the Regional Director issued her Decision and Direction of Election on October 29, 2104. Ex. 1. She found a unit of packaging, shipping and receiving employees appropriate. *Id.* at 17. She again addressed the issue of whether the lead employees were supervisors. *Id.* at 6–7. Thus, the Regional Director in this case reconsidered and decided again exactly the same unit issues that were considered and in 21-RC-133636 and made the subject of a final order.

For the reasons discussed below, as well as those previously raised to the Regional Director and incorporated herein by reference, the petition in this matter should be dismissed with six months prejudice to refiling another petition seeking or including any unit packaging, shipping and/or receiving employees employed at the Facility. The election currently scheduled for December 4, 2014, should be cancelled immediately. Alternatively, the election should be held in abeyance until such time as this petition is dismissed or the Board orders an election only

in a unit that includes shipping, packaging, receiving, terminal, maintenance and quality employees along with all lead operators and employees working in those departments.

B. The Petition In This Matter Should Be Dismissed With Prejudice

In 21-RC-133636, the Union sought to include a unit of only the Facility's packaging, shipping and receiving employees while excluding lead employees as statutory supervisors. It refused to proceed in any other unit. That petition was dismissed because the Regional Director concluded any appropriate unit must include the lead employees, and the Petitioner said it would not proceed in any such unit.

Rather than file the required Request for Review, the Petitioner filed a second petition in this matter just five days after the D&O issued. This second petition sought the same unit that was just dismissed as inappropriate. At the hearing on October 2, 2014, the Petitioner confirmed that it was seeking exactly the same unit that it sought in Case 21-RC-133636. Ex. 9, October 2, 2014 Tr. 2 at 5–6 and 13. It requested and received reconsideration of whether the lead employees in the classifications it sought were supervisors. This, of course, was the only issue decided in 21-RC-133636. The only difference in the two cases is that the Petitioner elected to "change its mind" about whether it would proceed in a unit that included lead employees in this case if it lost again on the issue of whether they were statutory supervisors because, as stated on the record, the Petitioner may have "screwed up" when it made its decision at the August 21, 2014 hearing to proceed only in a unit that excluded lead employees. Ex. 10 at 15; Ex. 9, October 2, 2014 Tr. at 20. Board law does not permit this kind of vexatious, piecemeal second guessing.

First, the Board's Rules and Regulations make clear that the unit determinations made by the Regional Director after consideration of a hearing record are "final." 29 CFR § 102.67(b). The only way to challenge these determinations is to file a Request for Review with the Board.

Id. Even then, the grounds for review are very narrow. 29 CFR § 102.67(c). They do not include permitting a petitioner to change a position taken at the hearing solely because the party does not like the outcome that its positions at the hearing produced. They certainly do not permit allowing a petitioner to ignore completely the procedures requiring a request for review by filing a new petition seeking to re-litigate the same issues in the same unit at the same facility while the period to request review as to the first petition is still pending solely because the Petitioner "changed its mind" about or might have "screwed up" as to positions taken at the first hearing after seeing the results they produced.

Here, of course, the Petitioner never filed a request to review the D&O issued in Case 21-RC-133636. Thus, the Order and the decisions made therein are beyond consideration in any other proceedings for at least six months. *See infra* at 12.

Second, any effort by the Petitioner to change the position it took as to the unit it defined in Case No. 21-RC-122636 after the close of the August 12, 2014 hearing would by definition require a re-opening and then reconsideration of the record. The Rules and Regulations do not permit the Petitioner to do this in the circumstances created by the two petitions it has filed. A request to re-open the record after the close of the hearing, or a motion for reconsideration or for a rehearing for that matter, requires "extraordinary circumstances." 29 CFR § 102.65(e)(1). Specifically excluded from such grounds is raising any issue that could have been raised but was not raised under any other section of the Rules. *Id.* Indeed, a request to re-open the record or for a rehearing requires specification of the error alleged, the prejudice to the movant caused by this error, what new evidence is to be produced, why it was not available at the hearing, and how it would change the result. *Id.* A motion for reconsideration requires the identification of a

material error with particularity and page number of the record. Of course, these requests must be made in the proceeding where the record was created, *i.e.* Case No. 21- RC-133636. *Id.*

The Petitioner has never made any effort to define any circumstances requiring reopening or reconsidering the record in Case 21-RC- 133636 because none exist. To the contrary, the Petitioner's only stated purposes for filing the second petition seeking to relitigate the issue of whether lead employees are statutory supervisors is that it "changed its mind" and ' . . . the Union or its counsel may have screwed up at the last hearing" by stating that it would not proceed in any unit including lead employees. Ex. 10 at 15; Ex. 9, October 2, 2014 Tr. at 20. If the Petitioner wanted to "change its mind" about which units it found acceptable, it should have done so when given a recess to do exactly that at the hearing held in Case No. 21-RC-133636. The Petitioner cannot avoid the consequences of its actions and decisions or the required procedures required to challenge their consequences merely by waiting to see how its first position fares, ignoring the adverse ruling it produces, and then filing a new matter seeking to relitigate the issue it lost solely because it "may have screwed up" by making a choice that led to a result it did not like.

Third, the Board has been consistent in its view that parties should not be allowed to litigate issues in an untimely or piecemeal fashion. *E.g.* 29 CFR § 102.65(e)(1)(no motion for reconsideration, rehearing or to re-open the record shall be considered by the Regional Director with respect to any matter that could have but was not raised pursuant any section of the Board's Rules); and *cf. Jefferson Chemical Co., Inc.,* 234 NLRB 992 (1972)(Board will not condone piecemeal litigation of ULP claims); *Peyton Packing Co., Inc.,* 129 NLRB 1358 (1961)(same). The Union's petition in this matter violates both of these principles.

The Petitioner had every opportunity to change its position as to what units it would accept before and during the hearing in Case. No. 21-RC-133636. The Regional Director issued her decision based upon the evidence in the record and the Petitioner's stated position as to whether and to what extent it would proceed to an election based upon determinations made on that record. The Petitioner had procedures available to it to challenge the Regional Director's determinations based upon the record and the positions asserted by the Petition at the time the record was created. The Petitioner chose not to use those required procedures. Whether the instant petition is considered an effort to re-litigate the same issues already decided in Case No. 12-RC-133636, or a piecemeal effort to offer a new position in a new proceeding as to the same unit at the same facility that was addressed in Case 21-RC-133636 that could have and should have been made in the first case, it is clear that the Union's petition in this case is improper and should be dismissed.

Finally, the Casehandling Manual makes clear that the instant petition should be dismissed regardless of how the Petitioner attempts to define it. Since the Petitioner seeks the same unit it sought in Case No. 21-RC-133636, and this unit has already been found inappropriate, the petition should be dismissed for this reason alone. Casehandling Manual Part Two Representation Proceedings (CHM) § 11011. To the extent the Petitioner purports to change its position in this case and seek a different portion of the unit at issue in Case No. 21-RC-133636, it cannot do so without first accepting the dismissal of the petition in Case No. 21-RC-133636, requesting review of the decision in that case, or seeking withdrawal of the petition. Accepting dismissal, or any withdrawal to the extent such an option is even available at this stage, must come with prejudice and with a six month bar to filing a new petition. *E.g.* CHM § 11112.1(a).

In light of the above, it is clear that the very integrity of the Board's processes is at issue in this proceeding. To the extent there is any ambiguity in the application of the Board's Rules and Regulations and the Casehandling Manual, they should be made clear now. The Board should not permit petitioners to avoid the consequences of positions taken at hearings merely by ignoring the decisions of Regional Directors and filing new petitions seeking to relitigate the same issues that have already been decided using positions or arguments that were available but intentionally not used in the first proceeding.

The Rules and Regulations clearly define the procedures required, not suggested, to challenge the decisions and orders of Regional Directors made after a hearing in a representation case has concluded. The Board should make clear that these procedures are the only available options to challenge the decisions and orders of Regional Directors made upon the completed record in a representation proceeding. Allowing Regional Directors to ignore these Rules and Regulations for the sole purpose of allowing a petitioner to "change its mind" to receive a "do over" because the petitioner did not like the outcome of the first hearing should be deemed a misuse of the powers delegated to Regional Directors by Section 3(c) of the Act and a denial of due process to the other parties to the representation proceeding.

Second, the Board's decisions are clear in establishing that the Board will not condone piecemeal or vexatious litigation. *E.g. Jefferson Chemical, supra; Peyton Packing, supra.* To the extent that there is any question (as suggested by the Regional Director – *see* Ex. 8 at unnumbered p. 2) that this sound principle is applicable to representation proceedings, the Board should clarify that point now. Parties in representation proceedings should be required to state all their positions at the appropriate hearing and accept the results these positions produce

without the option of getting another hearing solely to "change its mind" because it made a mistake if it does not like what its positions produced the first time around.

If any party is unhappy with the results its positions produce, then that party should be required to use the mandatory mechanisms set out in the Board's Rules and Regulations for challenging those results. Parties to representation proceedings should not be allowed to do what the Petitioner has done here. That is, seek to avoid the consequences of the positions it has taken at a hearing by ignoring the Board's Rules and Regulations and instead filing a new action less than a week after a Decision and Order has issued solely on the grounds that the party made a mistake and would like to try again by either changing its position to one it could have or should have taken in the first proceeding and/or re-litigating an outcome it does not like.

Finally, the Board should confirm that actions such as the one taken by the Petitioner in this case have consequences. The Casehandling Manual is clear that petitions withdrawn after a hearing has been closed cannot be refiled for a period of six months. It makes no sense to suggest that this same prejudice period should not apply when the petitioner's petition is dismissed after a hearing has closed because a petitioner states it will not proceed in any unit other than the one it defined and litigated at a hearing, and the Regional Director concludes this unit is not appropriate. To conclude otherwise would condone, if not encourage, exactly what has happened in this matter. A party can take one position at a hearing and see what result it produces. If it does not like the outcome, it can bypass the requirements of the Board's Rules and Regulations defining how decisions must be reviewed by filing a new action seeking the same unit under a different theory that it could have or should have raised in the first proceeding. This vexatious conduct produces exactly the kind of wasteful misuse of resources that the Board has condemned in other contexts. *See Jefferson Chemical,* 200 NLRB at 992 n.3.

It is no answer to suggest, as the Petitioner did before the Regional Director, that this prejudice period should not be applied because it might delay the unit employees' ability to vote on the question of representation. This is particularly true in this case where the unit employees participated in the decision that led to the dismissal of the first petition. The Petitioner brought and called four employee witnesses to the August 12, 2014 hearing. *See* Ex. 14, August 12 2014 Tr. 183–263. The Petitioner was provided a recess at that hearing specifically for the purpose of evaluating its position as to whether it would proceed in a unit that included lead employees. Thus, the unit employees had ample opportunity to express their views on this subject through their selected representative at the hearing – the Petitioner. Moreover, and in any event, any delay in the ability of unit employees to vote caused by dismissal of the petition would be of less duration than the one caused by a petitioner withdrawing a petition just days before an election, and far less than delays caused by a petitioner filing meritless blocking charges.

In the final analysis, it is important for the Board to clarify that the wasteful and vexatious misuse of the Board's procedures pursued by the Petitioner in this case will not be tolerated. The Board should make it clear that the procedures in its Rules and Regulations must be followed and that there are consequences for calculated and intentional decisions to do otherwise.

Thus, the Board should immediately order that the election scheduled for December 4, 2014, be cancelled. It should further order that the petition in this case be dismissed with prejudice such that the Petitioner is precluded from seeking an election in any unit including packaging, shipping and or receiving employees at the Facility for a period of six months from the date of the Board's Order.

IV. ALTERNATIVELY, IF THIS MATTER PROCEEDS, THE BOARD SHOULD ORDER AN ELECTION ONLY IN THE FULLY INTEGRATED PRODCUTION AND MAINTNENANCE UNIT SOUGHT BY THE EMPLOYER.

A. The Relevant Facts Related To The Unit Determination Issues.

A detailed discussion of the facts related to the unit determination question is fully set out in the Employer's post hearing brief and is incorporated herein by reference. Ex. 15 at 2–12. For the reasons set forth in that brief at 12–25, the unit sought by the Petitioner should be deemed inappropriate. Should an election be ordered in this matter, it should be ordered only in the fully integrated production and maintenance unit sought by the employer.

B. Alternatively, The Board Should Order the Regional Director To Direct An Election Only In The Integrated Unit Sought By The Employer.

For the reasons brought to the attention of the Region in Case No. 21-RC-133636 and set out in Employer's August, 19, 2014 Brief at 12–15 and incorporated herein by reference, the Board should conclude that the standard set out in *Specialty Healthcare, supra* should be abandoned, or alternatively not be applied in cases such as this one where the unit sought by the Petitioner is only a portion of a fully integrated production process.[2] Moreover, and regardless of the standard used, and again for the reasons brought to the attention of the Regional Director and incorporated herein by reference, the Board should order an election, if one is ordered at all, only in the fully integrated production and maintenance unit that includes all packaging, shipping, receiving, terminal, quality control, maintenance, and lead employees and the Lab Tech 3. *Id.* at 15–25.

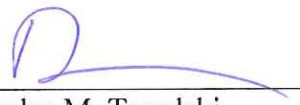
---

[2] The Employer is mindful that some circuits have concluded that Member Becker was properly appointed. *E.g. Gestamp S.C. LLC v. NLRB*, 769 F.3d 254 (4th Cir. 2014) *citing inter alia Teamster Local Union No. 455 v. NLRB*, 765 F. 3d 1198 (10th Cir. 2014). *See also Ender v. NLRB* 2014 U.S. App. LEXIS 21227 (D.C. Cir. *decided* November 7, 2014). None of these cases, though, provide any analysis of whether the appointment at issue was appropriate under the specific circumstances of Member Becker's appointment. That is, these cases do not address the issue of whether Member Becker's appointment was the type of political end run around the legislative branch the Supreme Court said was not permitted by the Constitution. *See Employer's August 12, 2014* Brief at 12-15 and authorities cited therein, incorporated herein by reference.

V. CONCLUSION

For the reasons set forth above, as well as those incorporated herein by reference, the Board should cancel the election currently scheduled for December 4, 2014, dismiss the petition with prejudice, and preclude the Petitioner from filing another petition in a unit seeking any employees working at the facility for a period of six months from the date of the Board's Order dismissing the petition. Alternatively, the Board should direct an election only in a unit that includes all packaging, shipping, receiving, maintenance, terminal and quality control employees working at the Facility, including all lead employees and operators who work in these classifications.

Respectfully submitted,



Douglas M. Topolski
Daniel A. Adlong, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1909 K Street, N.W., Suite 1000
Washington, DC 20006
(202) 263-0242Attorneys for Respondent, Cargill, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 12, 2014 this Employer's Request for Review was filed electronically and that service copies were sent via e-mail (given the volume, exhibits will follow by FedEx) to:

Robert A. Cantore, Esq.
Gilbert & Sackman
3699 Wilshire Blvd Suite 1200
Los Angeles, CA 90010
rac@gslaw.org

Olivia Garcia, Regional Director
National Labor Relations Board, Region 21
888 S. Figueroa Street, 9th Floor
Los Angeles, California 90017
olivia.garcia@nlrb.gov

Sylvia Meza, Board Agent
National Labor Relations Board, Region 21
888 S. Figueroa Street, 9th Floor
Los Angeles, California 90017
sylvia.meza@nlrb.gov

Douglas Topolski

19442465.2

Exhibit 16

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CARGILL, INC.
Employer

and Case 21-RC-136849

UNITED FOOD & COMMERCIAL WORKERS
UNION LOCAL NO. 324
Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.[1]

MARK GASTON PEARCE, CHAIRMAN

PHILIP A. MISCIMARRA, MEMBER

KENT Y. HIROZAWA, MEMBER

Dated, Washington, D.C., December 3, 2014.

[1] Member Miscimarra would find that the Employer has raised substantial issues about the appropriateness of the petitioned-for unit, and he would therefore grant review. He would not, however, apply *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), enfd. sub nom. *Kindred Nursing Centers East v. NLRB*, 727 F.3d 552 (6th Cir. 2013) for the reasons stated in *Macy's, Inc.*, 361 NLRB No. 4, slip op. at 22, 31-32 (2014) (Member Miscimarra, dissenting). Rather, under the Board's traditional community-of-interest standards, he would find that potential similarities among the petitioned-for unit and the terminal, maintenance, and quality-control employees, including functional integration, similar compensation and benefits, common supervision, and interchange warrant further review of unit appropriateness.

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE EXECUTIVE SECRETARY

FACSIMILE TRANSMITTAL SHEET

TO:
Sarah M. Rain, Esq.
Douglas M. Topolski, Esq.
Daniel A Adlong, Esq.
Robert A Cantore, Esq
Region 21

FROM:
The Board

Cargill, Inc.
21-RC-136849

DATE:
12/3/14

323-937-9139
714-754-1298
202-887-0866
248-593-2603
213-894-2778

TOTAL NO. OF PAGES INCLUDING COVER: 2

PHONE NUMBER:

OPERATORS NAME/NUMBER:
Alisa B. Jones 202/273-1946

RE:

ALL CONFIRMATIONS:BLANK

NOTES/COMMENTS:

1099 14TH STREET N.W.
WASHINGTON, D.C. 20570
TELEPHONE (202) 273-1067
FAX (202) 273-4270

Exhibit 17

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CARGILL, INC.,	)	
Employer,	)	
and	)	Case No. 21-RC-136849
UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL NO. 324	)	
Petitioner.	)	

EMPLOYER'S OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION

On December 4, 2014, an election was held in the above-referenced matter. On that day, the ballots were counted. The tally included 14 yes votes for the Petitioner United Food and Commercial Workers Union Local No. 324 (hereinafter "Petitioner" or the "Union"), 14 no votes cast for Cargill, Inc. ("Cargill" or "Employer"), 3 challenged ballots and 1 void ballot. Pursuant to Section 102.69 of the National Labor Relations Board's ("the Board") Rules and Regulations, the Employer files these Objections to conduct affecting the results of the election.

OBJECTION NO. 1: The election conducted in this matter is invalid because the petition should have been dismissed with prejudice as the result of the dismissal of Case No. 21-RC-133636. The National Labor Relations Board completely failed to address the Employer's sound arguments seeking dismissal in the Employer's Request for Review, thereby improperly failing to follow NLRB practices and regulations and denying the Employer and affected employees due process.

OBJECTION NO. 2: The Union, by its employees and agents, threatened voting unit employees with harassment and other consequences if they did not cease exercising their Section 7 right to oppose union representation. This illegal conduct took place between the date the petition was filed and the date election was held.

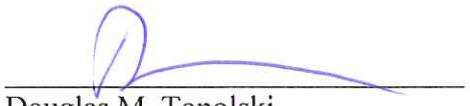
OBJECTION NO. 3: Union supporters engaged in electioneering in the polling area while the polls were open.

OBJECTION NO. 4: Union employees instructed the Union observer to solicit and encourage electioneering in the polling area just before the polls opened on December 4, 2014.

OBJECTION NO. 5: Union supporters engaged in a loud demonstration just outside the polling room while waiting in line to vote and while the polls were open and no effort was made by Board agents conducting the election to investigate or end this disruptive and illegal conduct.

HEARING REQUESTED: The Employer requests a hearing on the genuine issues of material facts raised by these Objections, which will be supported by competent evidence that will be timely submitted to the Regional Director in accordance with the Board's Rules and Regulations. Based on the evidence presented, the Employer requests that the results of the December 4, 2014 election be set aside and that the petition be dismissed with prejudice.

Respectfully submitted,



Douglas M. Topolski
Daniel A. Adlong, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1909 K Street, N.W., Suite 1000
Washington, DC 20006
(202) 263-0242Attorneys for Respondent,
Cargill, Inc.

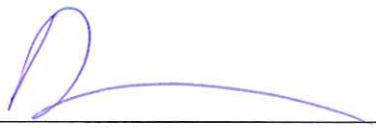
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of December 2014, the foregoing **Employer's Objections to Conduct Affecting the Election** was filed electronically and that service copies were sent via e-mail to:

Robert A. Cantore, Esq.
Gilbert & Sackman
3699 Wilshire Blvd Suite 1200
Los Angeles, CA 90010
rac@gslaw.org

Olivia Garcia, Regional Director
National Labor Relations Board, Region 21
888 S. Figueroa Street, 9th Floor
Los Angeles, California 90017
olivia.garcia@nlrb.gov

Sylvia Meza, Board Agent
National Labor Relations Board, Region 21
888 S. Figueroa Street, 9th Floor
Los Angeles, California 90017
sylvia.meza@nlrb.gov



Douglas Topolski

19725361.1